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FCC SYNDICATED EXCLUSIVITY RULES

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

THE FEDERAL COMMUNICATIONS SYNDICATED EXCLUSIVITY RULES

MARCH 21, 1990

Printed for the use of the Committee on Commerce, Science, and Transportation

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FCC SYNDICATED EXCLUSIVITY RULES

WEDNESDAY, MARCH 21, 1990

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on Communications,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:16 a.m., in room 253, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

Staff persons assigned to this hearing: Toni Cook, staff counsel; Gina Keeney; and William Heyer, minority staff counsels.

OPENING STATEMENT BY SENATOR INOUYE

Senator Inouye. This morning, we are holding a hearing on an issue concerning program exclusivity and cable television, the Federal Communications Commission's syndicated exclusivity and network nonduplication rules. These rules require cable operators to black out programming on imported broadcast signals at the request of local broadcast stations who have exclusive rights to that programming.

In 1972 the FCC adopted rules that were very similar to the new syndicated exclusivity and network nonduplication rules. At that time, the cable industry was in its infancy and its primary operation was the provision of programming to those parts of the country that did not receive broadcast signals. Cable television then consisted almost exclusively of retransmitted signals and the broadcasters wanted to protect the programming off those signals.

The syndicated exclusivity rules were the result of negotiations between the broadcasters and cable operators concerning copyright issues related to the retransmission of broadcast station signals. In 1980 the FCC eliminated the syndicated exclusivity rules when it found that the benefits to the public would outweigh any adverse effects on the broadcast industry.

Eight years later, when the FCC reexamined these rules, it found that many of the assumptions that served as a basis for the repeal of the rules had not proved correct. The Commission concluded that cable penetration had exceeded all predictions and was competing with broadcast stations for programming, audiences and advertizing revenues. In addition, because of the significant increase in the use of VCRs by viewers, the Commission found that it is not so important to have access to the same shows at different times.

On the basis of this new environment, the FCC proceeded to adopt new rules which went into effect at the beginning of this year. The purpose of this hearing is to assess the impact of the rules and determine whether they further the public interest.

This subcommittee will explore whether the complaints about the rules are isolated incidents that can be addressed by the FCC without repeal of the rules, or whether the detriment to the public is so widespread as to require reconsideration of the need for the rules.

Our first witness today is the Deputy Chief, Mass Media Bureau of the Federal Communications Commission, Mr. William Johnson, and he will be followed by Mr. Robert Thompson, Vice President of Government Affairs, Telecommunications, Inc., Mr. Steven R. Effros, Community Antenna Television Association of Fairfax, Mr. William H. Duhamel, President, Duhamel Broadcasting Enterprises of Rapid City, South Dakota, Mr. Gary Brant of Scottsbluff, Nebraska, Mr. Travis Rockey, Cordillera Communication, Transwestern Plaza, of Billings, Montana, and Mr. Jeff Treeman, Senior Vice President of United Video Incorporated.

I want to thank all of you for joining us this morning and I look forward to discussing these matters with you.

I have opening statements from Senators Hollings and McCain that I will insert in the record.

[The statements follow:]

OPENING STATEMENT BY THE CHAIRMAN

The purpose of this hearing is to consider the impact of the Federal Communications Commission's syndicated exclusivity and network non-duplication rules. The rules permit local broadcast television stations to enforce their exclusive contracts to show certain programs in the communities the broadcasters are licensed to serve. About a decade ago, the FCC eliminated these rules based primarily on the assumption that there would never be any competition between cable and broadcast television and the belief that repeal would be in the best interest of the public.

In 1988, the Commission reinstated the syndicated exclusivity and network non-duplication rules. Those rules are now in place, and for some viewers, in certain parts of the country, the new rules have resulted in significant changes in the programming available to them, and those viewers are not happy. Consequently, we are here today to take a close look at the rules and determine if they serve the public interest.

I appreciate having the opportunity to hear the testimony of your witnesses here today.

OPENING STATEMENT BY SENATOR MCCAIN

Reimplementing the syndex rules appears to have created a stir in certain parts of this country. Many people are complaining about losing channels, having to watch their favorite program at a different time and about blackened screens. Some of this complaining I'm sure will subside as we go through a transition and as cable operators hopefully substitute new programming for programming that was dropped.

But in some areas, like Yuma, Arizona, where the Phoenix CBS affiliate had to be dropped because of the rights of the California CBS affiliate, some relief is in order. I understand there are several other areas of the country, particularly in towns near State borders, where this type of problem also exists.

I'm looking forward to the testimony today and am interested in suggestions on how we can remedy this situation.

Senator INOUYE. May I now first call upon Mr. William Johnson. Mr. Johnson, welcome. You may proceed as you wish. We received your statement. It will be made part of the record.

STATEMENT OF WILLIAM JOHNSON, DEPUTY CHIEF, MASS MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Mr. JOHNSON. Mr. Chairman, Members of the Subcommittee, I regret that Mr. Stewart, who was originally scheduled to appear, is unable to be here this morning. He has a rather severe family problem he has to deal with.

I thank you for the opportunity to participate in your review of the Commission's cable television syndicated network nonduplication rules.

On January 1 of this year, as you know, the new rules went into effect, which permit but do not require broadcasters to negotiate for the same kinds of enforceable exclusive distribution rights for syndicated programming that cable systems and other program exhibitors now enjoy and have enjoyed for many years.

Under these rules, if a broadcast station has purchased exclusive rights to a program and has made a proper request, no cable television system may import the program into its local broadcast area from a distant station. Often the first visible sign, and the only initial reality of these rules for cable subscribers is a change of existing program service.

The American public has a strong bond with the television programming it views, and understandably any change caused by government is viewed with skepticism. In this regard, we are very conscious of the concerns that are created for some working people who may lose access to programming from a different time zone, the difficulties that may result when the switching process does not work correctly and coverage of a football game in progress, for example, is terminated, and the potential problems when a cable system almost simultaneously increases its rates and then subtracts programming.

These are the short-term problems with the new rules. At least some of these difficulties, like those associated with improperly functioning switches, are clearly transitional in nature and will be cured as time and experience with the rules progress.

Other problems, admittedly, are not transitional, and they will have an impact on viewers that will be particularly pronounced, at least in the short-term. It is the Commission's belief, however, that in the long-term, these rules should improve the quality and diversity of television programming that the public receives. Thus, it is important that the long-run benefits be understood even if temporary transitional problems may be arising.

The current rules were adopted at the end of a comprehensive proceeding, and an extended period was provided prior to the implementation of the new rules so that there would be ample time for cable operators and broadcasters to purchase the program rights involved and prepare to comply with the rules. During this time, the rules were reviewed by the United States Court of Appeals, which sustained them as being both within the FCC's authority and based on adequate evidence.

Adoption of these rules was intended solely to benefit the television viewing public by ultimately increasing program diversity. The television viewers that the rules were intended to benefit included both the 55-plus percent of the population that now are cable subscribers and the remaining portion of the population that does not want, cannot afford or does not have access to cable service. While the interests of these two groups often coincide, this is not always the case, so that both groups need to be considered separately and the interests off-air viewers not forgotten.

For the programming marketplace to work to the advantage of viewers, it must communicate information from viewers to the suppliers and distributors of programming concerning what types of programs and what specific programs the public desires. This cannot occur if cable systems are free to ignore the exclusive rights of others.

With exclusivity rules in place, broadcasters and cable companies can engage in competition for programs that results in the program being carried by the station or system whose viewers value it most. In these ways, the rules improve the situation of both over-the-air and cable viewers.

The absence of these rules is detrimental to the interests of cable subscribers, because this exemption from compliance with normal exclusivity rules permits, and indeed encourages, cable system operators to distribute programming that duplicates that which is already available in the local market.

The rules are also of particular value to television viewers who are not cable subscribers, and should improve the programming mix in the local television market. Without syndex and network nonduplication protection, broadcasters may find it uneconomical to purchase certain programs that they would purchase if they could get exclusivity. As a result, television viewers in that area who do not subscribe to cable would not be able to see these programs at all.

Finally, in the environment created following the Court of Appeals elimination of the "must carry" rules, effective exclusivity rights are one of the few remaining tools local broadcasters have to use in their competition for cable carriage.

Because the rules are new, transitional problems are almost inevitable. The rules do, however, contain specific mechanisms for facilitating subscribers continuing to receive uninterrupted service. First, there is never a requirement that the entire signals be deleted. In-state or big city news, weather and sports programming that are not going to broadcast locally need never be deleted under these rules.

Second, if the duplicative programming appears to be highly valued by subscribers because of the convenience of its viewing times or for other reasons, the system operator may bargain with those who own the program rights to stop the deletion process.

This will, of course, require that the owners of those rights be compensated. In this regard, however, it is important to remember that the rules do not automatically create exclusive rights. Rather, a station must itself have purchased these rights from the owners of the programming.

Third, alternative programming may be substituted for that deleted. This may be either programming from another broadcast station, or programming created or distributed specifically for cable use.

Fourth, those stations whose signals are potentially subject to deletion may acquire the necessary rights so that their programs are not eliminated. It appears, for example, that Atlanta Station WTBS and Chicago Station WGM, will virtually never have programming deleted from their signals because they are making a deliberate effort to make their signals attractive to cable subscribers through the acquisition of necessary program rights.

In conclusion, while transitional problems may exist, the rules should nevertheless be understood not as an infringement on the rights of cable subscribers, rather they should be viewed as an effort to make both the broadcast and cable program production and distribution systems more responsive to the interests of all viewers.

Again, I thank you for the opportunity to present the Commission's views on the subject, and I would be happy to respond to any questions you may have.

[The statement and questions and answers follow:]

STATEMENT OF ROY J. STEWART, CHIEF, MASS MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to participate in your review of the Commission's cable television syndicated exclusivity and network nonduplication rules. With me is William Johnson, Deputy Chief (Policy) of the Mass Media Bureau.

On January 1 of this year new rules went into effect that permit, but do not require, broadcasters to negotiate for the same kinds of enforceable exclusive distribution rights for syndicated programming that cable systems and other program exhibitors now enjoy and have enjoyed for many years. Under these rules, if a broadcast station has purchased exclusive rights to a program and has made a proper request, no cable television system may import the program into its local broadcast area from a distant station. Parallel rules of the same general type apply to network programming.

Often the first visible sign and only initial reality these rules have for cable subscribers is a change of existing programming service. The American public has a strong bond with the television programming it views and, understandably, any change caused by government is viewed with skepticism. In this regard, we are very conscious of the concerns that are created for some working people who may lose access to some programming from a different time zone, the difficulties that may result when the switching process does not work correctly and coverage of a football game in progress, for example, is terminated, and the potential problems when a cable system, almost simultaneously, increases its rates and subtracts programming.

These are the short-term problems with the new rules. At least some of these difficulties, like those associated with improperly-functioning switches, are transitional in nature and will be cured as time and experience with the rules progresses. Other problems admittedly are not transitional, and they will have an impact on viewers that will be particularly pronounced in the short term. It is the Commission's belief, however, that in the long term these rules should improve the quality and diversity of television programming that the public receives. Thus, it is important that their long run benefits be understood, even if temporary transitional problems may be arising.

History

Rules of this type were first applied to cable television system operators as long ago as 1965. These rules protected the rights of local television stations to be free of cable television duplication via distant signal carriage of both network and syndicated programming for a period of 15 days before and after the local broadcast. Rules Re Microwave-Served CATV, 38 FCC 683 (1965). The rules were narrowed in scope in 1966. CATV, 2 FCC 2d 725 (1966). Then, in the early 1970's, the cable television industry agreed to the broadening of these rules as new laws were in the process of adoption to determine how cable system operators and their customers would pay for the distant television broadcasts they carried.

There was a broad industry and governmental consensus that system operators would be exempt from the usual requirements of the copyright law and of the marketplace so that they would not have to negotiate for and purchase distant signal programs from those who had created and owned these programs. Instead, copyright payments would be made to a government agency and would be distributed to program owners pursuant to a so-called "compulsory copyright license." At the same time, it was to be the Commission's job to enforce rules designed to assure that the exclusive rights in programming purchased by local stations would be respected. Exclusivity rules of this type were adopted in 1972 (Cable Television Report and Order, 36 FCC 2d 143 (1972)), eliminated again in 1980 (CATV Syndicated Program Exclusivity Rules, 79 FCC 2d 663 (1980)), and then readopted in 1988.

Comprehensive Rule Making Proceeding

The current rules were adopted at the end of a comprehensive proceeding in which the views of the general public as well as the industry groups involved were sought. More than 90 parties filed comments responsive to this invitation which the Commission considered fully in reaching its decision to reimpose these rules. An extended period (18 months) was provided prior to implementation of the new rules so that there would be ample time for cable operators and broadcasters to purchase the program rights involved and prepare to comply with the rules. During this time the rules were reviewed by the United States Court of Appeals which sustained them as both within the FCC's authority and as based on adequate evidence. Further delays in the implementation date where denied. United Video v. FCC, No. 88-1514 (D.C. Cir. Nov. 17, 1989).

Objectives of Rules

Adoption of these rules was intended solely to benefit the television viewing public by ultimately increasing program diversity and not to aid or injure broadcasters, cable system operators, program creators, or any other private industry group. The television viewers that the rules are intended to benefit include both that 55% of the population that are now cable subscribers and the remaining 45% of the population that does not want, cannot afford, or does not have access to cable service. While the interests of these two groups often coincide, this may not always be the case so that both groups need to be considered separately and the interests of off-air viewers not forgotten.

The primary objective of these rules is to improve the welfare of both segments of the audience by stimulating those who produce and distribute programming to better respond to the interests of the viewing public. In adopting the rules, the Commission found that unrestricted importation of distant signals (i.e., with no exclusivity protection) was an anomaly in the programming distribution system. Broadcasters, sports programmers, and theaters currently negotiate for exclusive program rights among themselves; only cable stood outside this exclusivity system and was able to effectively negate the exclusivity these other parties had bargained for. The effects of cable's ability to bypass normal exclusivity arrangements are pernicious for all viewers, whether of cable or off-air television: the lack of exclusivity leads to duplication of programming in local broadcasting areas; this duplication lessens the value of syndicated programs to broadcast stations; that loss of value, in turn, lowers the price syndicated program suppliers will receive for their programs; and all of this ultimately reduces program supply, which translates into a reduction in the diversity of programming available to viewers of both cable and broadcast television.

For the programming marketplace to work to the advantage of viewers, it must communicate information from viewers to the suppliers and distributors of programming -- broadcasters, cable operators, broadcast and cable networks, news, sports, and entertainment program producers -- concerning what types of programs and what specific programs the public desires. This cannot occur if cable systems are free to ignore the exclusive rights of others. With exclusivity rules in place, broadcasters and the cable companies can engage in competition for programs that results in the program being carried by the station or system whose viewers value it most. In these ways the rules improve the situation of both over-the-air and cable viewers. In the absence of any mechanism to protect rights in programming, local broadcasters are frustrated in their efforts to purchase and protect programming that is most desired by the local audience.

The absence of these rules is detrimental to the interests of cable subscribers because this exemption from compliance with normal exclusivity rules permits -- indeed encourages -- cable system operators to distribute programming that duplicates what is already available in the local market rather than searching out programming which is different and more valuable to subscribers. Because of the compulsory copyright licensing process and in the absence of exclusivity protections, the system operator has no incentive to select and purchase programming that subscribers will value most highly. Which particular programs will most satisfy the interests of subscribers is simply not an issue for the system operator when the system operator is able to ignore legitimately acquired exclusivity and acquire programming without the permission of its owners.

The rules are also of particular value to television viewers who are not cable subscribers and can improve the programming mix in the local television markets even if they do not lead to a change in program supply.

Without syndex and network nonduplication protection, broadcasters may find it uneconomical to purchase certain programs that they would purchase if they could get exclusivity. As a result, television viewers in that area who do not subscribe to cable will not be able to see those programs at all.

The rules should have a positive effect on competition, and service received by the public, by permitting broadcasters to differentiate their product from that of others so that they can attract and maintain an audience. The Commission further believes more effective competition not only improves the programming of broadcast stations but also that it results in the best possible mix of programs across different types of video outlets and that it increases the number, quality, and diversity of programs which are produced.

Finally, in the environment created following the Court of Appeals' elimination of the cable television local broadcast signal carriage [must-carry] rules, effective exclusive rights are one of the few remaining tools local broadcasters have to use in their competition for cable carriage. If broadcasters are deprived of the ability to compete for carriage, a prime source of local diversity for both cable subscribers and others alike will suffer.

Transitional Issues

Because the rules are new, transitional problems are almost inevitable. The rules, however, do contain specific mechanisms to facilitate subscribers continuing to receive uninterrupted service.

First, there is never a requirement that entire signals be deleted. In-state or big city news, weather, and sports programming that is not going to be broadcast locally need never be deleted under these rules. Of course, system operators are constantly required to make choices as to what signals and services will be carried and which deleted and the new rules may tip the balance and cause whole signals to be dropped when it appears that a substitute service will better respond to subscribers and provide a better marketing opportunity. This should not happen, however, if the service deleted is more desirable to cable customers than possible substitute services.

Second, if the duplicative programming involved appears to be highly valued by subscribers because of the convenience of its viewing times or for other reasons, the system operator may bargain with those who own the program rights to stop the deletion process. This will, of course, require that the owner of those rights be compensated. In this regard , however, it is important to remember that the rules do not automatically create exclusive rights. Rather, a station must itself have purchased these rights from the owners of the programming.

Third, alternative programming may be substituted for that deleted. This may be either programming from another broadcast station or programming created or distributed specifically for cable system use. Substitute programming is available and computerized systems for locating and substituting will eventually be available to accomplish these tasks.

Fourth, those stations whose signals are potentially subject to deletion may acquire the necessary rights so that their programs are not eliminated. It appears, for example, Atlanta station WTBS and Chicago station WGN will virtually never have programming deleted from their signals because they are making a deliberate effort to make their signals attractive to cable subscribers through the acquisition of the necessary program rights. According to one estimate, WGN alone, because of its interest in making its service attractive to cable subscribers, is now available in one million new homes. What is of particular interest is not that WGN has gained viewers and other stations have lost them but that audience is being gained by a station that seeks to respond to the needs and interests of cable subscribers and is willing to invest in this effort. This is the very dynamic that the rules were intended to create.

A final point regarding the transitional period has to do with the fees that subscribers are paying. Cable rates have been increasing in recent years and that, by itself, is a concern to subscribers. Adding to the concern is the appearance, created by the exclusivity rules, that not only are rates going up but service is being cut back. A process is underway at the Copyright Royalty Tribunal that may be of some assistance in this regard. The Royalty Tribunal has responsibility for adjusting the copyright fees system operators pay for distant signal programming. When the syndicated exclusivity rules were deleted in 1980, the Tribunal increased the copyright payment levels. Now that the rules are back in place, the Tribunal has been asked to reduce the level again. If this takes place, it will provide some additional funds for the purchase of substitute programming or for other purposes.

In conclusion, while transitional problems may exist, the rules should nevertheless be understood not as an infringement on the rights of cable subscribers. Rather, they should be viewed as an effort to make both the broadcast and cable program production and distribution systems more responsive to the interests of all viewers through the restoration of those ownership rights that other participants in the video marketplace, including networks, network affiliates, sports programmers, video cassette sellers, and theaters currently have in other contexts. Indeed, cable companies themselves regularly take advantage of their ability to obtain exclusive rights in programming when they purchase programming for their own channels.

Again, I thank you for the opportunity to present the Commission's views on this subject. I would be happy to respond to any questions you may have.

QUESTIONS OF SENATOR McCAIN AND THE ANSWERS THERETO

Question: There have been very few problems in Arizona for the most part with the implementation of these rules. But Yuma, Arizona has been particularly hard hit.

Before these rules went into effect, the Yuma cable operator carried the CBS affiliate out of El Centro, California as well as the CBS affiliate out of Phoenix. But Yuma is included in the El Centro, California local television market. So when these rules took effect, the California station exercised its right in effect to knock the Phoenix affiliate off the cable system.

I have received a lot of complaints from my constituents in Yuma. Not only do they complain because they lost the CBS affiliate in Phoenix that was more tuned into Arizona but they are also annoyed that since the California CBS affiliate is in a different time-zone, programs are shown on Pacific not Mountain time. Does the FCC have any suggestions for how this situation can be remedied? Is some kind of waiver appropriate? What is you opinion of Congressman Hunter's bill in the House that would permit cable subscribers to receive the network affiliate that is in the same time zone as the subscribers?

Answer: The Commission's cable television rules do contain a process, in 47 C.F.R. Section 76.7, for parties to seek waivers in situations where the rules are operating in an inequitable fashion or are not functioning in a way that accomplishes their intended purposes. In addition, the underlying rules could be changed in response to a petition for rulemaking or through the legislative process.

Whether or not the Commission would be receptive to a request for waiver or a change in the rules would involve a balancing of a number of factors. A careful review of the pleadings filed would have to be undertaken before any judgment could be made. The application of the rules in a way that results in the public in the Mountain Time zone receiving network service from the Pacific Time zone appears to be a relatively unique situation creating problems for the cable systems involved and for those members of the public who subscribe to cable service and who previously had access to programming from their own time zone. The El Centro-Yuma market is, however, one of the smallest markets in the country. The ability of the stations in it to adequately respond to the needs of the public in the area, including, in particular, off-air viewers, may be heavily dependent on their ability to obtain exclusive rights in programming. Waiver or elimination of the rules in this context would deprive these stations of rights they have bargained and paid for and could adversely affect their ability to serve viewers in the El Centro-Yuma market.

The rules are intended to structure the competitive relationship between local stations and cable system operators so that the interests of viewers are responded to and diversity of program service encouraged. If there is a strong viewer interest in programming at alternative time periods, the rules specifically contemplate that the system operator may bargain with those who own the program rights to stop the deletion process. Accordingly, I believe it may be premature to focus on waivers or Commission or legislative changes in the rules until the market structure created has been given a fair chance to function and the interests of the public in the area are reflected in the actions of the cable and broadcast participants in the market who can resolve the matter locally.

Senator INOUYE. Thank you very much, sir. First, the complaints that you have received concerning the rules, are they limited to specific communities, or are they Nationwide?

Mr. JOHNSON. There are pockets of problems across the country, but it is not really a Nationwide problem as I perceive it and as I think our complaints reflect. There are particular problems with time zone crossing situations. In some situations, signals are deleted in their entirety because the blackout process makes it uneconomical to continue to carry a signal and there was an initial concern from the point of view of subscribers who do not see the substitution, the improved service coming with that, but those seem to pass by relatively quickly.

Senator INOUYE. Where are these isolated communities?

Mr. JOHNSON. Along the California border in particular, there are some time zone—the Lake Tahoe area, some communities toward the south of California. Of course, the concerns that are raised here, and throughout Montana, and the Scottsbluff area, those are the main ones. There are some along the Arkansas border. But it is not, at least in my perception, a widespread problem compared to the number of cable subscribers there are.

Senator INOUYE. Can the Commission do something to address these problems in these isolated communities?

Mr. JOHNSON. We do have a waiver process, and it is of course always possible to reevaluate the rules and see what we can do to fine-tune them, but I think really in some respects it is counterproductive to pay too much attention to try to improve the rules early on, because it leaves the parties involved to try to concentrate on changing the rules, rather than making themselves work under the rules.

I think that is part of the problem we are facing now. We gave the parties an extended period of time to get ready for the rules, an 18-month period, but lots of them continued to believe that the rules would be eliminated through the court process, so they concentrated their energies on legal fees rather than working out ways to comply with the rules, so I think we really need to have at least a decent period for the parties to work out the rules the way they were intended to work out.

Senator INOUYE. Do you find most broadcasters are exercising their rights under the rules?

Mr. JOHNSON. I think the pattern is somewhat mixed. The rules do, in effect, force the local cable operators and the local broadcasters to talk to each other, something which is highly desirable.

In some situations the broadcasters are only asking for protection of their premier product—the events, the programs, that they pay very high fees for—and in order to avoid consumer discontent they are not asking for protection for every program.

Typically, they are asking for protection, I believe, under the network nonduplication rules. Unfortunately, in small markets, isolated areas with large rural populations, the public has become used to lots of cable service, but the broadcasters also need all the protection they can get because they have a very small economic base to start with, so in some of those areas I think the broadcasters see their own economic need requiring them to enforce the rules more aggressively. So it is a mixed pattern across the country.

Senator INOUYE. Do you have any statistics which would indicate as to the number of stations that have been deleted from cable systems since the rules went into effect?

Mr. JOHNSON. No, I am afraid we have not kept information of that type.

Senator INOUYE. But it is your feeling that this is not nationwide but in isolated areas?

Mr. JOHNSON. I would say it is a more isolated situation than a nationwide problem.

Senator INOUYE. Thank you very much. Senator Gorton?

Senator GORTON. Network non-duplication.

I would like to follow up on one of the Chairman's questions. Do you know at this point which of the three alternatives is most common and how common the other alternatives are?

In a rural area or, for that matter, an urban area right here in Washington, D.C., the cable brings not only the Washington, D.C. stations, but the Baltimore network stations as well.

In how many markets has the reaction been no change at all, no claim for a blackout even when the claim could be asserted under these rules? In how many places has a claim for the blackout simply resulted in a blackout of the particular programs which were subject to it but the rest of the station's broadcasting is still on?

In how many has it caused the cable company to drop the station entirely and is there any case in which the cable companies have responded in the way that you'd like to have them respond and put on some kind of alternative programming in place of the programs which are blacked out?

Mr. JOHNSON. I am afraid we do not really have a very good statistical fix on what the pattern of compliance is, and people are still working into the process, particularly in terms of substitute programming. That takes a while to work out.

It is my perception that a fairly significant number of cable systems were carrying duplicative network signals, and either because of these rules or using these rules as an excuse, they have deleted the duplicating network signals. When that takes place, there is a substitution typically.

Senator GORTON. But it is a substitution of an entirely different channel?

Mr. JOHNSON. That's correct. There are constantly new cable channels coming on, and space is needed for these channels. Many of them are highly attractive to consumers, and I think it is the perception of the cable operators, almost regardless of these rules, that these new services will be more attractive in the long run than a duplicative signal.

Senator GORTON. At least it is your seat-of-the-pants judgment, then, that the most frequent response has been deletion and substitution of a different station?

Mr. JOHNSON. I would say that is the kind of problem in substitution we see happening. The other one is, for example, if a cable operator simply deletes a particular program and substitutes a program they have purchased in the open market. We really do not hear about that or, I should say, we do not receive complaints.

You do see some trade publication reports that indicate that the substituted programming is not a highly desirable programming. It is just filler programming. But we have not received a lot of complaints about that kind of thing taking place, and there are situations also in the category where some kind of arrangement is made so that the requests are withdrawn, and that involves the negotiation between the cable operator and local broadcaster.

Senator GORTON. But the largest number of complaints you have received have been when there was a pure deletion or a deletion and substitution?

Mr. JOHNSON. We receive lots of complaints when there is a deletion of a network signal, even if it is a duplicating network signal.

We also receive lots of complaints where there is a blanked out channel. There frequently are phone numbers put on that channel, so it is logical for us to receive complaints in those situations.

Senator GORTON. Thank you, Mr. Chairman.

Senator INOUYE. Thank you very much.

I would like to now recognize my colleague, Senator Exon. He has an opening statement to be followed by questions.

OPENING STATEMENT BY SENATOR EXON

Senator EXON. Mr. Chairman, thank you very much. First, thank you for granting my request to hold this hearing. The new FCC blackout rules have provoked controversy among TV viewers in my state, and your cooperation to ensure that Congress and the FCC takes a look at this is very much appreciated.

On January 1st of this year the new FCC rules on syndicated exclusivity and network non-duplication went into effect. Both sets of rules allow local broadcasters to require cable systems to black out programs from important stations if those programs duplicate those shown by the local broadcaster.

Mr. Chairman, I understand the intent of the FCC in wanting to encourage more diversity in programming and protect local broadcasters. Also, I understand the desire of local TV broadcasters to have strong advertising basis. Without that they are not going to survive.

I support a strong system of local broadcast stations for local news and other community services as well as to provide broadcast signals to rural areas which are not wired for cable, and this is another area that is a major concern and not addressed very often in these halls or, I suppose, before the FCC.

It is important that we keep our local stations viable. What concerns me is the disproportionate impact the rules seem to have in a few areas and the resulting citizens opposition in those areas.

When large numbers of average citizens and communities most affected by the rules oppose them, that indicates to me that the FCC at least should take a closer look and help to find or force compromises, if you will, to help solve the problems that many, many are very much involved in.

In Scottsbluff, Nebraska, I have been informed that 204 hours per week of programs carried by two Denver stations is blacked out. Western Nebraska is much closer to Denver than it is to

Omaha and Lincoln. Many people go to Denver for business, medical services and social events.

I have been contacted by many Scottsbluff area citizens asking that the FCC rules be changed. They want to keep a choice that includes the Denver stations, Denver programming, and even the Denver public service announcements and commercials. Some say they do not understand why Federal bureaucrats should be able to dictate what they view.

Now, on these kinds of suggestions and others there has to be maybe a better understanding of the overall problem. I only cite this, Mr. Johnson, to give you some idea of the depth of the concern out here.

Hopefully more things can be done voluntarily, and I noticed in your testimony that you said you had allowed a sufficient time for the broadcasters and the local T.V. cable operators to get together, and they have not.

One of the questions I will ask you is what did you do to help bring that about or did the FCC, as they oftentimes do when lots of people are not involved, just stand back and say well, there are not many people involved, so we do not have to be concerned about it.

Hopefully I would agree with you that maybe more things can be done voluntarily by cooperation between broadcasters and cable companies to address these citizens concerns.

In addition, hopefully, some fair compromise can be found on issues arising from the FCC rules themselves. For example, one possible compromise idea that I have suggested—and when I suggested this to either the cable operators I get a glazed look from them—I suspect the reason I get the glazed look is nobody wants to compromise. That is why, Mr. Chairman, we are holding this hearing.

I think it is the obligation of those up here to try and force compromise when two sides will not compromise, each blaming the other for interrupting what the citizens what to see.

I have suggested would it not be possible to come up with some kind of an inconvenience for the signals coming in from Denver, Colorado. Example. If you have an exclusive program such as a network news show, would it not be possible for the cable operator to maybe twice during the program in a half an hour period be required to put a 30-second or one-minute spot saying under FCC rules, this program—we are calling it to your attention that this program is being simultaneously broadcast on channel so-and-so.

I would think that if I were watching the news that I really think belongs to the local broadcaster because without that kind of programming and advertising, the local broadcaster might not be able to make it—I think if I were watching the news on a Denver station and I was interrupted by a 30-second blank on the screen explaining what it is, it might be a good idea to switch over to the other station.

If I were watching a Big Red football game, I sure would because I would not want to miss any of it. It seems to me that there must be some way to have a compromise without simply blocking out that signal.

I would appreciate comments and suggestions from you and the other witnesses today on that idea or anyone else that has an idea for a compromise because to do date nobody wants to compromise. They would rather fight.

And when they fight, a politician gets caught right in the middle of it, and I am not one to sit back and not try to help out when things like this occur. I want to be sure that the voices of the average T.V. viewers are heard and carried to Washington, D.C. Unfortunately, they do not have the funds or the time to be able to come to Washington and testify at these Senate hearings.

However, Chairman Inouye has been gracious enough to allow a citizen representative, Mr. Gary Brandt of the Scottsbluff area to testify by way of videotape at today's hearing.

Mr. Brandt is an independent businessman involved in a citizens' effort opposing the rules proposed by the area local governments who want to testify.

Controversy from the FCC rules has also occurred in other western Nebraska cities of Gering, Alliance and Kimball. In addition, at the other end of the state I have been contacted by citizens of Fairbury, located in southeastern Nebraska, who oppose the rules because an Omaha TV station has been dropped as a result.

Mr. Chairman, I really look forward to the testimony and answers to questions of Mr. Johnson. I thank you for holding this hearing.

I also want to especially welcome today Mr. William Duhamel, President of the company which owns KDUH-TV in Scottsbluff as well as Mr. Robert Thomson of TCI, Incorporated, which owns the Scottsbluff cable television system.

Hopefully the information that is gathered here from this hearing will lead to present problems being resolved to the benefit of all concerned.

I pledge to work in good faith with all interests towards finding some compromise that is fair, and I thank you, Mr. Chairman, for holding this hearing, and I look forward to the other witnesses who will be testifying.

Could I ask a question of Mr. Johnson? Have you and the FCC tried to work out any compromise on these matters or suggested any kind of a compromise or have you just stepped back and said you fight him?

Mr. JOHNSON. In the particular situation of Scottsbluff, we have not been involved prior to this hearing. What we have tried to do is create a set of rules which give the parties some incentive to get together.

Clearly the consumers in the area are mad at both the cable operator and the local broadcaster and should provide all the incentive that is needed for these parties to get together and work out some way of giving the public the kind of programming they want and not resulting in the continuing annoyance of them.

We did, when we adopted the rules, provide an extended period of time which we had hoped would be used for that kind of a negotiation process prior to the rules going into effect. There was a 18-month period between the adoption of the rules and their effective date. Six months prior to their going into effect, the broadcasters had to start notifying the cable operators of what was coming.

But, unfortunately, the judicial process took us up right to the last minute. The hope was still alive that they in effect would not have to take the final exam and it would snow that day and everybody could go home.

So I think the serious process really did not start until the beginning of this year.

Senator EXON. So what you are saying, Mr. Johnson, is you gave them 18 months to work it out. You said that the courts became involved, which I know they did. And you thought 18 months of you fighting him and we will stand back and watch it and then you work it out, and you, nor the Commission, no one on the Commission or the rest of the bureaucrats made any move to try and bring the sides together.

You felt that was their job rather than yours, is that right?

Mr. JOHNSON. I think that is correct. We try and get the marketplace to work out these solutions, get us out of the way, and I am hopeful and I think the Commission is still hopeful that generally speaking that is going to be the way it works out.

Senator EXON. Did you ever consider taking another look at this and at least go out and try and have the expertise of your agency meet with the people, meet with the local broadcaster, meet with the cable people on the local scene to try and maybe set some kind of a compromise that might be used in other places?

Mr. JOHNSON. I have not heard that suggestion at the agency.

Senator EXON. Is that a good suggestion or is that a bad suggestion?

Mr. JOHNSON. I think that is a good suggestion.

Senator EXON. I think that would be a good suggestion also. What I want to get these people to do is to have you and the FCC recognize that while there are a relatively small, infinitesimal amount of citizens affected by this in the United States, they are citizens nonetheless and they are a minority. I think they need more consideration than they have gotten and I thank you for the answer to my question.

Senator INOUYE. Thank you very much.

Senator Burns.

OPENING STATEMENT BY SENATOR BURNS

Senator BURNS. Thank you, Mr. Chairman. I would like to thank you for calling this hearing. It is a troubling problem. It appears that when the FCC or Congress is asked to be a referee in this matter and we become the flag-throwers, we are finding that we are operating from a rule book that may have some flaws in it. Nonetheless I think it can be fixed one way or the other, hopefully to the advantage of everybody.

The syndex and network non-duplication rules mean that television broadcasters can enforce an exclusive right to show certain programs in its community. It is a simple business contract that is the foundation of the American free enterprise system.

While many cable operators are replacing protected programming with alternative programming, some cable systems, unfortunately, are showing blank screens or have dropped distant signals containing protected programming and have urged viewers to complain to Members of Congress and the FCC.

Such a policy does not serve the American public well. However, it did double the activity in my mail room in one week. The activity has picked up there considerably.

Alternatives are available for the cable operator, including negotiating with the local television broadcasters and acquiring substitute programming. The new syndex and network non-duplication rules should not result in a blank screen on cable systems unless the cable operator, one, chooses not to negotiate or, two, chooses not to provide substitute programming.

I also note that the only programming subject to these rules is that which local broadcasters in their communities are already providing free of charge for all people. Thus, operation of these rules will result in increased programming choices for cable subscribers by replacing duplicative programming with alternative programs.

Ordinarily, business may enter into contracts and have the terms of those contracts respected. In 1976, however, the Federal Government granted the cable industry a compulsory license to use television programming without first contracting for it in the open market. Without syndex, broadcasters find that cable's compulsory license can actually take precedence over their own negotiated contracts.

So this would lead to suggestions, and maybe some assumptions, that we may not be on the right track. I suggest that the ultimate solution to the problem we are addressing here today is the elimination of cable's compulsory license. It is true, after all, that syndex and network non-duplication rules are necessary due to the operation of cable's compulsory license, which allows cable operators to take broadcasters' programming without permission and pay nothing or relatively little for such programming.

American viewers would reap significant benefits from the elimination of the compulsory license. First, the compulsory license inhibits the free flow of information about consumers' tastes and programming preferences and in turn weakens program producers' incentives to match their output with such consumer demand.

Second, by creating an artificial price structure at below market rates for broadcast programming, the compulsory license distorts cable operators' choices in favor of such broadcast programming and away from cable networks.

Third, the compulsory license provides cable operators with a subsidy which allows them to secure programming at below market rates, thereby disadvantaging competitive alternatives to cable in the program acquisition marketplace.

Fourth and finally, with the presence of the cable compulsory license and the absence of must-carry, broadcasters are severely harmed. Under the existing arrangement, cable can acquire broadcast programming at bargain basement rates without permission, while broadcasters have no guarantee of access to the cable system.

I look forward to hearing the testimony of our distinguished witnesses. We have with us today people that have a unique perspective on circumstances surrounding implementation of these new rules in my home State of Montana. We are one of the problem areas. When you look at the size of the State, we span almost a full time zone. We butt up next to the central time zone on our eastern borders, and on our western borders we butt up next to the Pacific time zone. So we have some difficulties at our borders when we talk about these rules.

I appreciate the effort that Travis Rockey and Bob Thomson have made in attempting to resolve the unique problems in Montana resulting from operation of these rules. I also want to welcome Bill Duhamel who is here from Rapid City. I can remember when he was selling boots and saddles, and it was probably a simpler business than the one he is in now. But I appreciate and I am looking forward to your testimony because you are uniquely qualified to give us some insight into these problems.

Thank you, Mr. Chairman. I will ask my questions as they come up.

Senator INOUYE. Thank you, sir.

I believe Senator Exon has another question.

Senator EXON. One question. We want to get moving along.

You heard the suggestion that I made, Mr. Johnson. Have you heard of that before? Has it been talked about? In your opinion, would it be technically feasible for the cable operator, if they wanted to, to put a notice on the screen two times every half an hour that this is being simulcast on some other channel or that this show can also be seen at such and such? Is something like that technically feasible?

Mr. JOHNSON. Something like that is, I think, clearly technically feasible. It could create some problems under the Copyright Act because there is something being laid over the existing programming. We have had some issues about crawl information, even emergency information. There have been some questions about copyright problems.

But those probably could be worked out. Whether it would be a long-run solution, I am not sure. I think the object over the long run should be to make this a consumer-friendly process and having a notice like that could be a continuing aggravation to consumers. It is clearly better than having a blank screen.

Senator EXON. I would think so. We can agree on that. Well, if that kind of compromise will not work, I suggest we keep pursuing others.

Thank you.

Senator INOUYE. Thank you very much, Mr. Johnson. You have been very helpful, sir.

Now may I call upon the panel—Mr. Thomson, Mr. Effros, Mr. Duhamel, Mr. Rockey, and Mr. Treeman? And we will listen to Mr. Brandt by video.

Senator EXON. I suggest, Mr. Chairman, in courtesy to those who are here, that we listen to them first and then we will end up with Mr. Brandt's video presentation, if that is all right with you.

Senator INOUYE. Fine, sir. I will now call upon the Vice President of Government Affairs, Tele-Communications, Inc. of Denver, Colorado, Mr. Robert Thomson.

STATEMENT OF ROBERT THOMSON, VICE PRESIDENT, GOVERNMENT AFFAIRS, TELE-COMMUNICATIONS, INC., DENVER, CO

Mr. THOMSON. Thank you, Mr. Chairman. I would like to get right to the heart of the matter today. All of you I think have copies of my statement, which gives some background.

Senator INOUYE. May I assure all of you that we have received your statements and they will be made part of the record in total.

Mr. THOMSON. Thank you, Mr. Chairman. That statement does detail in summary fashion how distant carriage of imported broadcast stations began in the cable industry.

Before going much further, I would like to acknowledge the fact that both Senator Exon and Senator Burns have been instrumental in trying to work out the problems that exist with respect to syndicated exclusivity in both of their States. I think that the proper process is one of negotiation and one of compromise, and with Senator Exon's offer and Senator Burns' continuing involvement I am sure that over time an acceptable alternative to the current situation can be found.

I think what we are dealing with here is more or less the law of unintended consequences, a law that always seems to crop up when the government begins to fiddle around with free marketplaces.

By and large, TCI, our company, agrees with the philosophy that has been expounded or that was expounded by Chairman Patrick when his FCC promulgated the syndicated exclusivity rules. The concept was based on the importance of contracted-for program exclusivity, the long-term benefit that will flow to television viewers as a result of government-protected programming exclusivity. Senator Burns referred to this.

There is no question that over the long term it will yield a greater variety and a higher quality of television programming, if it is equally applied, if it is equally applied to all distribution mediums. It is an enormously powerful competitive tool. As all of you are aware, the television networks were the first to pioneer this tool by establishing an enforceable, territorial, exclusive network affiliate system throughout the nation.

It has worked very well for them. They now have over an 80 percent market share of television viewing in the United States. To give you some comparison, all 65 cable networks, taken together, have a 19 share. It has worked very well for them.

The law of unintended consequences takes place because—and this is an important point--we cannot commercially justify or economically justify the carriage of a duplicated distant network affiliate. It is not possible over the longer term. The reason is we have to pay three times in order to do that.

Let us take Scottsbluff for an example. Right now we bring in all three of the Denver nets, as you are aware, Senator Exon. We have to pay, number one, a copyright fee in order to bring in that distant signal. Number two, we have to pay the carriage fee, in this case an expensive satellite carriage fee, in order to do that. And if we are to fill the blank spots, which is 90 percent of the imported signal now, that means we have to pay a third time for the license fees for that substitute programming.

So it is not commercially feasible for us to continue carriage of a distant signal that is duplicated. We are going to have to drop all of those signals, if in fact this rule stays in place. That is not a commentary on whether we should or should not, given the importance of program exclusivity. It is an economic fact.

The second unintended consequence has to do with something really the FCC and probably, I am sure, the Senators of this Committee were not aware of, and that is that the commercial traffic that was carried—that is, the imported signals that were carried—that commercial traffic often supported other non-economic services of high value from a public policy standpoint.

A typical example is in Montana. We have established a microwave system from Salt Lake City and Spokane which goes into Montana, as Senator Burns knows, and distributes commercially these imported television signals throughout the State of Montana.

What people do not know is that we also distribute the sole PBS station for free, and the commercial carriage pays the freight. If in fact we have to drop the network affiliates from Salt Lake City and from Spokane, that commercial traffic disappears, and it no longer is commercially feasible, unless we can find some way to do it, to continue to operate that microwave system to distribute the sole Montana PBS signal to all of our customers. That is a problem.

Let us take Nebraska, for example. The way we bring the Montana signals into Nebraska is by using our Netlink service, which also provides a subsidized white-area service to dish owners who cannot receive network television any other way. What pays for that are cable head ends. When we start dropping these distant Denvers at all of these cable head-ends, the subsidy for that Netlink service disappears and the dish owners suffer.

So there is more to it in each and every case than meets the eye.

I can say these problems will be worked out. They will be worked out much faster if the regulatory bodies and the legislative bodies agree that cable television also has the right to do exclusive programming.

I cannot tell you how delighted I was to hear the FCC officially acknowledge today that cable does have an enforceable exclusive right to bargain for program exclusivity. That is a major fear of our industry. This committee reported out a bill last year which would take away our right to do that.

Another bill has been introduced this year, S. 1880, which would substantially reduce our ability to do exclusive programming. You cannot expect us to be enthusiastic about solving the broadcasters' problems with respect to program exclusivity at the same time there are substantial threats to our access to this important competitive tool.

Thank you.

[The statement follows:]

STATEMENT OF ROBERT THOMSON

VICE PRESIDENT, GOVERNMENT AFFAIRS,

TELE-COMMUNICATIONS, INC.

Mr. Chairman and Members of the Committee, thank you for permitting me to testify regarding the effects of FCC syndicated exclusivity and network non-duplication rules on local television viewing in our service areas.

Our company, Tele-Communications, Inc. ("TCI"), started out about 30 years ago as a community antenna television service in Montana, Wyoming, and Colorado. At that time, there were vast stretches of rural America, particularly in the West and Midwest, that had no local television service at all. A number of cable pioneers, including the Chairman of our company, Bob Magness, built expensive antenna towers on adjacent mountain tops or constructed microwave systems to bring television to many small communities through local cable distribution.

In many cases, where there were no local broadcast stations within hundreds of miles, it cost hundreds of thousands of dollars to build and maintain the microwave system used to import signals from the nearest big city. In Montana, for example, TCI provided clear reception of Salt Lake City and Spokane stations by building extensive microwave circuitry which at one point stretched all the way to Williston, North Dakota.

Commercial traffic on TCI microwave systems often supported services that would not otherwise be commercially feasible. In Montana, TCI provided, free of charge, statewide distribution for the State's only public television outlet. Commercial carriage of imported television signals paid the freight.

Later, when satellite technology became feasible, TCI uplinked the Denver broadcast stations onto Satcom 1R, a satellite positioned over the western United States, through its Netlink subsidiary. This enabled TCI to provide lifeline, big city television to cable systems in rural communities where there was no local broadcast station or where there had been traditional regional carriage of Denver television.

Commercial satellite transmission of the Denver signals to rural cable systems enabled TCI to provide a noteworthy service which would not otherwise be economically feasible. Netlink also provides its signals to "white area" residential dish owners who could not otherwise receive local network and independent television broadcasts either off-air or via cable.

Mr. Chairman, as you and the Members of the Committee might imagine, rural homeowners became accustomed to seeing regional television. In most cases, broadcast stations were imported from large cities that had economic, cultural, or social influence over a broad geographic area. In the case of the broadcast stations from Salt Lake City, they were avidly watched by substantial Latter Day Saints' communities throughout Idaho and Montana.

Even when local broadcast service was initiated in many of these rural communities, television viewers enjoyed the novelty and extra choices that big city television sometimes provided. To be sure, most watched their local broadcast stations most of the time, but in a city such as Scottsbluff, Nebraska, for example, many wanted, at least an option to tune in to the Denver TV stations that were carried on our local cable systems there.

In many ways, regional network television was an equalizer. It gave rural communities a number of broadcast television choices comparable to those enjoyed by viewers in large urban areas. For communities such as Scottsbluff, where spending nights at home with one's family is still a treasured custom, that could be important.

By issuing and implementing its syndicated exclusivity and network non-duplication rules, the FCC under then-Chairman Dennis Patrick, chartered a different course. The new rules make carriage of distant network television stations commercially impracticable in almost all rural communities. An average of 85 to 90 percent of a network affiliate's programming is network programming that must be blacked out under the new rules. To continue carriage of the 10 to 15 percent of an imported affiliates' local programming means a rural cable system must continue to pay the full copyright fee for the imported signal, the microwave or satellite transmission fee, and in addition, substantial license fees programming the channel during blackout periods which cover most of the viewing day. Given the pressure on cable rates, we have no choice but to delete almost all our distant network affiliate carriage if these rules stay in effect.

The portion of the rule providing local protection for syndicated programming is less onerous. The targets of "syndex," the national superstations, have sidestepped the rule by making their cable feeds syndex-proof, and the marketplace for syndicated programming has adjusted as well.

We are not in disagreement with the philosophy behind the Commission's new rules. Chairman Patrick believed that by perfecting a local distributor's property right to exclusive programming, consumers would eventually benefit. Exclusivity would eventually yield greater variety and quality of programming. In fact, exclusivity, it was noted, is the key ingredient to programming development, and even the minor blemishes represented by rural cable carriage of regional network television would be eliminated if programming were to flower as it should.

It was recognized that local cable operators would be the enforcers of the new rules and would be the primary target of consumer dissatisfaction. However, as the Commission said, it was in cable's best interest to be supportive of the rules because program exclusivity was an enormously important competitive tool for cable as well as broadcasters.

The Commission was correct about the competitive advantages of programming exclusivity. Exclusivity in the distribution chain drives the entertainment industry and most other businesses, as well. In television, the pioneers of territorially exclusive distribution were, in fact, the broadcast networks. Even before the Commission's new rules, consumers in almost all major cities could receive ABC programming through only one local ABC affiliate, as an example. Now, even in smaller markets such as Scottsbluff, consumers can receive ABC programming only through my fellow panelist, Bill Duhamal's ABC affiliate, KDVH.

By promising exclusivity to its affiliates, ABC can ensure distribution of the programming it purchases and its advertising throughout the United States. This gives ABC and the other networks enormous clout when bidding for rights to programming.

The system has worked very well for the Networks. During the first months of this year, NBC had a market share of 20 and CBS and ABC each had shares of 19. By comparison, the more than 65 cable networks, all together, had only a share of 19.

However, at the same time the FCC has reaffirmed the broadcast industry's right to exclusive programming, the broadcasters along with others are arguing that the rights of cable -- one of its competitors -- to bargain for programming exclusivity should be taken away. This is where our company, other cable operators and cable networks begin to have serious problems.

Late last year, both the National Association of Broadcaster ("NAB") and the trade association representing independent television stations ("INTV") announced their support for S. 1880 which, in many instances, would strip away cable's rights to bargain for exclusive programming. Moreover, both organizations have urged the FCC to do the same by regulation.

In addition, at least two Commissioners from the FCC, the very same agency that issued the rules protecting broadcaster exclusivity, have been quoted as leaning towards regulations which prohibit cable from bargaining for programming exclusivity vis-a-vis satellite and MMDS competitors.

Most preposterous of all, some have suggested that General Electric and General Motors, partners in the Sky Cable DBS venture which will compete against cable in every television household in the U.S. by mid-decade, should have mandatory access to programming developed and paid for by the cable industry. Each of these giant multi-national conglomerates are many times bigger than the entire cable industry combined. Surely, they can bargain for, and, if need be, develop their own programming without government assistance or subsidy from cable subscribers.

Cable's right to bargain for programming exclusivity must be preserved. Narrowly-drawn exceptions which extend limited cable programming access to under-financed competitors might be justified if it is established as fact that they need a cable subsidy to survive. However, under current circumstances, that is a very difficult case to make. More than 25 third-party packagers now provide satellite programming to C-Band dish owners at a price less than cable customers pay. More than 30 MMDS operators now distribute a full range of cable programming in competition with cable operators.

Both the Congress and the FCC are at a decision point regarding programming exclusivity. You must decide whether you will consistently embrace the concept of programming exclusivity or reject it. Permitting exclusivity in some cases, but not others is fundamentally unfair. A course of action in between means essentially that you are picking and choosing among rivals who should be allowed to vie in the marketplace with equal access to this important competitive tool. If cable operators are expected to absorb complaints from our customers about syndex and network non-duplication rules, we must be able to promise them the same long term benefits from programming exclusivity that are enjoyed by our competitors in the broadcast industry.

Senator INOUYE. Thank you very much.

May I now call on Mr. Effros.

STATEMENT OF STEPHEN R. EFFROS, COMMUNITY ANTENNA TELEVISION ASSOCIATION, FAIRFAX, VA

Mr. EFFROS. Mr. Chairman, Members of the committee, thank you. My name is Steve Effros. I am President of Community Antenna Television Association.

I would like to follow up on Mr. Thomson's comments about this unintended consequences problem. We heard this morning from Mr. Johnson that the FCC had this long, involved 18-month process. I take great exception to that. CATA was one of the organizations that appealed the Commission's decision on syndicated exclusivity and nonduplication protection not because we disagreed with exclusivity. We happen to agree that the concept of exclusivity makes sense.

What happened was the Federal Government in 1980 changed the rules. We had eight or nine years of the American public, our viewing subscribers, getting used to a new rule, and then the Commission came along and changed the rules again, and it is that change that we were arguing about, not the underlying concept of exclusivity.

We argued that the Commission, for all its supposed expertise, had no idea what the impact of these rules would be either in their proposal that it would aid broadcasters or that it would not impact on the public, which it clearly has, and you have gotten the mail to prove it, and so have we. To date, there is absolutely no proof of a significant aid to broadcasters in terms of an economic change in their conditions.

The problems we face and the problems we hear about are blithely talked away as interim problems, for instance as Mr. Johnson said, improperly functioning switches. I challenge you gentlemen to go into your own home and see if all of your clocks change on the hour precisely. The FCC seems to have this idea that every cable operator and every broadcaster can coordinate every clock so that everything will happen perfectly, everything will happen simultaneously and the public will have no idea that anything happened in terms of changing program content.

Indeed, for eight years we did have a solution. Mr. Exon, I think that this is one that we should consider. In terms, for instance, of network nonduplication, the cable industry provided network nonduplication but on a simultaneous basis so that if the same program was being shown by two different stations, we had equipment that automatically substituted the local program with the local commercials for the distant program. The subscriber never knew the difference. They got the same program. They saw it in the TV Guide and they got it at the same time. They just got the local programmer's advertising, not the distant programmer's advertising.

This is something you can do because computers can look at the two signals and when the computer sees they are the same signal there is an automatic switch.

The Commission changed the rules. It said it is no longer simultaneous. We are going to add protection for nonsimultaneous programming. Interestingly enough, in all of this 18 months of expert agency writing of rules, they did not define the word "simultaneous". We are still asking the Commission to define the word "simultaneous" so that we know whether it means the same time, the same clock time. At the moment the FCC report says 8:00 p.m. to 11:00 p.m. in different time zones is simultaneous! This is a remarkable use of the term.

These are the problems we face. We face a so-called expert agency that wrote a set of rules but did not let any of the parties see the rules until they adopted them. Yes, there was a long process. There was a long debate about the policy concepts, but when it came to actually writing rules, the rules were adopted before anybody saw them. It was only during the reconsideration process and the appeal process that we could try to get anything changed. Of course, that is way too late.

So there are problems. The problems in many cases come not from the theoretical base but from the practice, from how this actually works for the public. The Community Antenna Television Association took a look at this specifically from the point of view of smaller operators. We hear today, for instance, your recommendation, Senator, that there be notices put up on the screen, or cable operators are criticized because there is a black screen rather than a substitute program.

I am here to tell you gentlemen that for smaller operators this is an extremely expensive process. You are talking about taking two or three or four signals and then substituting programs with different tape decks and different equipment for each channel. A smaller operator cannot afford to do it. It is not realistic, particularly at a time when the same committee is studying bills that say, well, we ought to freeze their rates, we ought to regulate their rates, and we are going to have the same expert agency that put us in this mess do all that.

Frankly, I have to admit, I was in that expert agency for five years. I spent time there. I know how those rules get written, and the public is usually the one that loses because the public, as you mentioned, does not have the opportunity to look and determine how their interests are affected.

In the case of syndicated exclusivity, we have a problem of execution. How do you really do this after the public has gotten used to something else?

I agree with Mr. Thomson and the suggestions that have been made here, that over a period of time there are solutions and there are compromises that can be reached, but when an expert agency comes along and drops a set of rules on everybody where we can go page upon page of questions that the agency still refuses to answer. There is no answer, for instance, regarding a definition of syndicated versus network programming in precise terms. For instance, "Cheers" is a network program although it is often treated as a syndicated program if it is sold off network.

We have problems with the definition of the term "simultaneous". We have problems with the confusion over what is the definition of 1,000 subscribers. As you heard the Commission state this morning, their solution to all this is to not review the rules right now. So we are out there trying to deal with the public, we are getting a black eye for it because we have to black out programming, you get complaints, we hear about the complaints that the cable operator is doing something nasty, and now you are talking about reregulating the cable industry, and all this is because of the expert agency that you are now suggesting should regulate us some more!

It is a frightening cycle as far as we are concerned. We would like to discuss some solutions. I would suggest that simultaneous nonduplication, for instance, would be one that we could accomplish very easily. We did for years, and the public did not complain about it, and it would provide a certain level of protection.

I will stop and respond to questions because there is a lot more that could be said. Thank you.

Senator INOUYE. Thank you very much, Mr. Effros.

Mr. Duhamel.

STATEMENT OF WILLIAM F. DUHAMEL, PRESIDENT, DUHAMEL BROADCASTING ENTERPRISES, RAPID CITY, SD

Mr. DUHAMEL. I picked up a head cold here, so I have a little problem. I think this temperature going up and down has affected it.

Senator INOUYE. Welcome to the club.

Mr. DUHAMEL. I want to thank the Chairman and Senator Exon for this opportunity to appear before the subcommittee today on an important issue for my station and for many other stations, particularly those in the small rural markets.

Since 1958 my family has owned and operated KDUH-TV, first in Hay Springs and later in Scottsbluff, Nebraska. The station has never been a moneymaker and has been subsidized almost from the beginning by our other television operations in Rapid City, South Dakota. Yet, we have worked hard to provide the local news and public affairs which are not available on distant signals and have been proud to serve the people of the Nebraska panhandle as their local ABC affiliate.

But we are like every other commercial television station in America in one respect. If we are to operate successfully, we must have local advertising. If local cable viewers can see the same programs we provide on KUSA, an ABC network affiliate brought in from Denver some 200 miles away, then the potential audience we can deliver to those local advertisers is greatly diminished. That is why the FCC saw the need and reaffirmed the right of stations to be the exclusive providers of network and syndicated programming in their region of the country.

With the reinstatement of the FCC's Syndex and network nondupe rules we now have the opportunity to turn the financial position of our station around while at the same time continuing to provide important services and add additional improvements which the people of Western Nebraska have come to expect.

Both KDUH and the other Scottsbluff station, CBS affiliate KSTF, show their network programs at a time that the people of the Nebraska panhandle have come to expect them. That time may or may not coincide with the programming decisions of the affiliates in Denver. However, a survey of the two stations in Scottsbluff shows that together we provide the exact same network programs simultaneously with our Denver sister stations over 71 percent of the time.

Overall, 99.7 percent of KDUH's and KSTF's network programming airs simultaneously or within one hour of when the Denver stations air the same programs. I can elaborate if you want to get into why there is a difference there.

Given this situation, I cannot agree with those who contend that the loss of Denver programming on the local cable system has in any way inconvenienced anyone or prevents anyone on cable from having the fullest opportunity to watch the programs carried by ABC and CBS.

Let us remember during our discussions here today that one-third of the people in the viewing area are not cable subscribers. Many of these people are poor, or elderly on fixed incomes, who cannot afford cable, or are ranchers and farmers who cannot get cable. Their only source for TV programming is the over-the-air signals from the local Scottsbluff stations. Were Congress to revoke the network nonduplication rules, it would endanger our continued ability to provide those signals to anyone who wants them free of charge.

When we have less revenue, then we are less able to provide the amount of local service we want to the local communities in our viewing service. We were licensed by the FCC to serve these local communities, but without adequate financial support we will be even further strapped in that effort.

The solutions to this situation are several. TCI, the local cable operator, can provide alternative programming. There is a full range of cable services from which it can choose. In fact, one of the many positive developments of network nonduplication is that it frees up several channels which can be used to increase programming diversity for cable subscribers.

Another solution, which is a traditional method of providing network nonduplication protection, would be for the local cable operator to carry the Nebraska stations in place of the Denver ABC and CBS signals whenever the two show simultaneous programming. That would reduce the irritation by at least 70 percent because the network programming is 71 percent simultaneous.

A third solution would be for TCI to stop blacking out the duplicating shows five minutes after they began or five minutes before they start, which is what has been going on. It seems to us the entire effort has been designed by TCI to enrage local citizens and create complaints to Congress and the FCC about Syndex and network nonduplication protection.

Mr. Chairman, all of the people on the Nebraska panhandle have only one source for local TV news, their local TV stations. With a third of the families living there not on cable, we are also the only source of TV programming of any type for thousands of area residents. We ask that you allow the FCC to continue to enforce its Syndex and network nonduplication rules to give them a chance to work, so that we may continue to provide free television to the people of the Panhandle, including local news, public affairs and political coverage.

Our stations are in fragile economic circumstances, and these rules give us a fighting chance to stay on the air and continue serving the people for whom both of the stations were licensed well over 30 years ago.

Thank you.

[The statement follows:]

STATEMENT OF
WILLIAM F. DUHAMEL, PH.D.
DUHAMEL BROADCASTING ENTERPRISES

I wish to express my appreciation to this subcommittee for the opportunity to include the following written testimony in support of continuation of the Network Nonduplication Rule and the Syndicated Exclusivity Rule.

I have been the President of Duhamel Broadcasting Enterprises in Rapid City, South Dakota since 1976 and have been actively involved in the corporation on a full-time basis for the past 23 years. Prior to that time, I was an Econometrician with Whirlpool Corporation in St. Joseph, Michigan and an Assistant Professor of Quantitative Methods and Managerial Economics at the Northwestern University School of Business in Evanston, Illinois. I have a Ph.D. in Management Science from the Stanford University Graduate School of Business. Also, I was a corporate officer of South Dakota Cable, Inc. from 1967 through 1988.

I am on the NAB Television Board and NAB strongly endorses the retention of Syndex and Network Nonduplication Protection. I am also the President of The 97 Television Stations, an informal association of 124 smaller market television broadcasters in 33 states. Each member station is affiliated with one of the three major television broadcast networks.

HISTORIC DEVELOPMENT OF NETWORK NONDUPLICATION PROTECTION

Network Non-duplication Protection extends back at least to 1965 when the FCC agreed that local television stations should not have identical network programs imported by cable from stations outside of the local market. As a result, either the duplicate network program brought in from the distant signal was blacked-out on the local cable system or if the distant program was simultaneous with the local program, the local signal was broadcast both on its own channel and substituted on the distant channel. This permitted the audience watching the distant channel to be attributed to the local station and allowed the viewers of that channel to see the commercials from the local sponsors. Through the years, the rules have been revised by the Federal Communications Commission a number of times. Usually the rules have been made less restrictive in an effort to help the "fledgling" CATV industry get established and prosper.

In the early days of television and cable in the smaller markets where there were not three commercial television stations, the local station(s) had a primary affiliation with one network and carried most of that network's programming along with the higher viewed programs of another network through secondary affiliation with one or two networks, depending upon the number of stations in the market. Cable was allowed to import the distant signals from the nearest urban center because this brought in the full complement of network programs from all three networks even though individual programs might be either blacked-out or rolled over with the local network program under the network non-duplication protection. In those days cable only offered the local stations plus the signals from a nearby urban area.

The networks have always contracted with their affiliates for EXCLUSIVE distribution of their network programming in the affiliates' local service area with regard to other broadcasters both locally and on cable. However, liberalization of the FCC rules did permit some duplicating network signals to be brought into the market on a non-simultaneous basis and many imported signals have been "grandfathered" by subsequent FCC rule changes. Thus, the Denver network signals were imported into the Nebraska Panhandle to bring in EXACTLY THE SAME programs as the local television stations were already carrying. Even though we are broadcasting from a 2,000 foot tower which provides line-of-sight coverage over the entire Panhandle of Nebraska, portions of Colorado, Wyoming and South Dakota as well as into the Sand Hills, the FCC arbitrarily restricted our nonduplication protection zone to 55 miles and to cable systems with more than 1,000 subscribers. (Many of these so-called excluded "Mom and Pop" systems are now owned by TCI which can well afford the necessary nonduplication switching equipment.)

REASONS TO OPPOSE NETWORK NONDUP

As I view it, there are only two reasons why a cable subscriber should be opposed to network nonduplication protection:

1) if the local stations SHIFTS the TIME of the program that the viewer wishes to see, and
2) if the QUALITY of the local signal is significantly inferior to what the cable subscriber can get from the imported distant signal.

TIME SHIFTING OF NETWORK PROGRAMS

In a typical week, KDUH-TV broadcasts all but one ABC television daytime program. We show the programs at the time that the people of the Nebraska Panhandle have traditionally come to expect the ABC programs, which may or MAY NOT coincide with the program decisions of the urban-programmed Denver stations. Even so, KDUH-TV broadcasts 54 hours per week (71%) at EXACTLY the same time as KUSA, the ABC affiliate in Denver. Another 22 hours of ABC programs are carried within an hour of the time they are broadcast in Denver. Thus, 99.3% of the KDUH-ABC programming is simultaneous or within one hour of its broadcast by KUSA in Denver. Only two 15-minute ABC programs per week are outside of the simultaneous or 60 minute difference from KUSA in Denver. This includes the ABC 15-minute weekend World News Tonight which we carry at 10:20 p.m. on Saturday and 10:15 p.m. on Sunday and both of which Denver delays until 1:30 a.m.

Tim Daniels, the Resident Manager of KSTF-TV in Scottsbluff, NE, estimates that 72% of the CBS programming is simultaneous with KMGH-TV, the CBS station in Denver. The remaining 28% of the KSTF-CBS programming is broadcast within 1 hour of the Denver broadcast. (The two CBS programs not carried by KSTF-TV are broadcast in Denver between 2:30 a.m. and 5:30 a.m. daily.)

Thus, 99.7% of the duplicating network programs broadcast by the two Nebraska TV stations are either simultaneous or within one hour of the Denver network broadcast! (See the Table at the end of this written testimony for details.)

SIGNAL QUALITY

The question of signal quality is a much more difficult situation. We have "heard" complaints about the broadcast signal quality although very few people have contacted us directly. We have sent our engineers from Rapid City to the Nebraska Panhandle to work with our local KDUH engineer in Scottsbluff to assure ourselves that KDUH was broadcasting a quality signal. We also hired a consulting engineer (who helped design our RCA antenna) at a cost in excess of $6,000 to come in and go to the top of the 2,000 foot tower to inspect the antenna to make sure that there wasn't some sort of damage that could affect the broadcast signal going into a particular area of the Panhandle. We were assured that the antenna was operating at peak quality.

CABLE RECEPTION EQUIPMENT

Monte Loos, the Operations Director for Duhamel Broadcasting Enterprises, was asked to appear at a meeting of the Alliance Cable Committee on February 6. Monte, who was raised on a farm in northeastern Colorado, asked, "When someone finds that they have brought home a gallon of sour milk, do they go to the farmer and complain or do they go back to the grocery store where they bought it?". Several years ago when we were able to get permission to get into the Alliance cable headend building, we discovered that a) KDUH was being processed with an antiquated tube-type processor representing 1950's technology, and b) ALL OTHER signals being carried on the Alliance cable system (owned by Telecommunications, Inc.) used modern state-of-the-art solid state receivers. When we asked the Alliance cable manager WHY, he responded that there was nothing in his TCI budget to upgrade the KDUH signal. We are talking about the purchase of a piece of equipment that costs about $600 by a company with admittedly nearly THREE BILLION DOLLARS in 1989 revenues and a cash flow in excess of a BILLION DOLLARS and with gross revenues in Alliance in excess of a MILLION DOLLARS. The antenna system being used to receive the KDUH signal 17 miles from the transmitter to the Alliance cable headend was decidedly inferior and not up to the quality that a farmer would put in if he was truly wishing to receive a good over-the-air broadcast signal (approximately $500). When the Syndex controversy erupted in Alliance in January, we contacted the Alliance cable manager and asked if Monte Loos and our Chief Engineer could get into his cable headend building to inspect the receiving equipment and to compare the quality of the KDUH signal that they were receiving off the air with the KDUH signal that they were distributing to their Alliance subscribers. We were told that "it was not then convenient" and we would have to do it "sometime in the future." After several contacts we are still waiting for that "future time."

NEED FOR ACCESS TO CABLE FACILITIES

For over 20 years I was a corporate officer in South Dakota Cable Inc. Recently, I asked the Chief Technician for South Dakota Cable how he went about setting up the cable signals for the local broadcasters. He responded that he used an "eyeball test."

Without attributing motives to anyone, it is a simple matter to slightly MISADJUST the processor for the local broadcaster if you wish to establish the inferiority of the off-the-air signals and the VALUE of the cable as an alternate source of programming. We need your help in gaining access to all cable headends so as to inspect the equipment that is being used for our signals as compared with the imported Denver signals and to compare our signal off-the-air with the signal after it has been processed by the cable operator. Some older cable systems are deteriorating and allowing external electrical interference and noise into the system to degrade the local broadcast signal. Subscribers often unfairly attribute this degradation to the broadcaster. In the public interest there needs to be an objective means of measuring the broadcast signal to see that the cable distribution plant does not degrade it.

NEED FOR CABLE STANDARDS

The broadcaster is subject to fines by the Federal Communications Commission if its signal does not meet defined standards. We need some teeth in the FCC rules so that the cable operator can also be fined if it is not replicating the broadcast signal up to the same set of defined standards. Since broadcasters have no legal recourse, it is impossible to force cable operators even to negotiate regarding their standards. The cable compulsory license gives cable operators the right to carry our signals even in a degraded form.

Attached to this written testimony is a declaration from Frank T. Etherington, Director of Engineering for Duhamel Broadcasting Enterprises. He suggests that the FCC should be able to adopt reasonable technical standards for the reception and re-transmission of broadcast signals by cable operators. He suggests standards at the headend of:

1) A signal-to-noise ratio on the received carrier of at least 45 db;

2) Ghosting maintained at not more than -37 db relative to the primary image; and,

3) Time duration between primary image and ghost image of no more than 300 nanoseconds.

Mr. Etherington estimates the equipment to perform these measurements range from $1700 to about $6000 depending upon the manufacturer. He estimates that the measurement would take no more than three minutes per channel to verify that the cable operator was meeting these quality standards. He goes on to suggest that "it is certainly reasonable that the quality of the channels used to distribute local broadcast signals should be at least as high as the quality of the channels used to distribute other programming" when the signal is received in the subscriber's home. The Federal Communications Commission is perfectly capable of specifying and enforcing these technical standards as long as they have the ability to enforce violations with significant fines so that the cable operator has an incentive to comply with the FCC rules.

CABLE INCENTIVES TO DEGRADE LOCAL SIGNALS

This is particularly troubling to us as cable is increasingly a competitor in the sale of local advertising. We are concerned that cable systems have a strong incentive to drive viewers from local broadcast channels over to satellite-delivered channels that have no local programming but do have local ad availabilities that are sold by the cable company. TCI is actively selling local and regional advertisers on its cable systems.

SUBSCRIBER IRRITATION CAUSED BY INACCURATE SWITCHING

TCI should RESET the TIMERS on their nonduplication program switchers to go into effect during the commercial break at 29:30 and 59:30 minutes after the hour rather than at 55 minutes past the hour or 5 minutes after the hour. If you want to irritate someone, let them watch a two-hour movie or hour program such as Hill Street Blues and then cut off the last five minutes with a Blackout Screen stating that the FCC rules on SYNDEX at the request of the local station REQUIRE this program to be BLACKED OUT. Similarly, TCI in Scottsbluff has waited a few minutes after the hour to switch on the Nondup or SYNDEX protection so that people would get interested in the new program and then have the program deleted. On KSTF-TV, a TCI representative indicated this was caused by inaccurate switching equipment and the fact that TCI didn't know when the Denver stations actually ended or started programs because of the varying length of commercials. Therefore, they were using a five minute leeway factor. In fact my home VCR turns off and on to the second and other than interruptions for live news specials, every station knows in advance exactly when a program starts or stops. This ±5 minute time error appears designed to deliberately irritate the cable subscribers and cause them to contact the FCC and Congress to complain about SYNDEX.

SYNDEX

When a station purchased broadcast rights for a particular program in a designated geographic area from the copyright holder, the Syndicated Exclusivity Rule permits the station to enforce its exclusive rights to show the program against cable operators in the designated geographic area.

The number of hours of syndicated exclusivity does not appear to be the problem, although KDUH is looking at 24 hours a week of programs for which we have purchased exclusive local rights at an annual cost in excess of sixty thousand dollars and finally received syndicated exclusivity against the imported Denver signals. KSTF-TV has purchased syndicated exclusivity on another 17.5 hours of programming. Together approximately 1/3 of the syndicated programs are either simultaneous or within one hour of the Denver broadcast.

Attached is a summary table showing the time at which KDUH-TV and KSTF-TV broadcast the network and syndicated programs in relation to the times at which the Denver stations are broadcasting the SAME programs.

THE MYTH OF THE REGIONAL TV STATIONS

In the early days, the urban signals were imported to provide program diversity to the local stations which carried almost exclusively network and local programs. With the expansion of the number of local stations over the last thirty years, the smaller market stations now carry network, local and syndicated programs. The so-called Regional TV Stations broadcast the SAME network and syndicated programs. These urban stations only purchase broadcast rights for their own local markets. The only different programming they provide is their own urban-oriented news and local programs which are NOT AFFECTED by the Network Non-dup and Syndex Rules. If they choose to become true "regional TV stations" with more regional programs, the present FCC rules do not stand in their way.

In the Nebraska Panhandle the present rules have little or no effect on two Denver stations--KCNC-TV (NBC) and KWGN-TV (Ind.) to provide Denver news and information to those who wish to watch.

KDUH-TV HISTORY

My mother, Helen S. Duhamel, who founded Duhamel Broadcasting Enterprises in 1954, moved to the Nebraska Panhandle in 1905 when she was two years old, and her family ranched on the White River just north of Chadron. She was raised there, attending elementary school in the Chadron area and high school in Alliance. After my grandparents were separated, her mother took her and her sister to Rapid City where she graduated from high school.

She believed in the people of the area and recognized their relative isolation, especially those in the rural areas, and therefore in 1958 she put the second Panhandle television station (KDUH-TV) on the air broadcasting from a hill just south of Hay Springs. Since Hay Springs had a population of less than 1,500 people (which has since declined significantly), the station was never economically viable and was subsidized by the Rapid City operation. However, KDUH-TV began almost immediately in 1958 to broadcast an hour and a half of daily LOCAL programming from the Hay Springs studios at noon, 5:30 p.m. and 10:00 p.m. We lost money over the next dozen years in Hay Springs.

CONTINUED FINANCIAL PROBLEMS

In 1970 Duhamel Broadcasting Enterprises put up a 2,000-foot tower west of Alliance to provide television service to the entire Panhandle as far east as the Sand Hills (Mullen). Our idea was to develop a large enough audience to reverse the financial fortunes of the faltering Hay Springs operation. The continual turn-over in employees especially FCC licensed operators (who averaged 14 weeks with us in Hay Springs) caused us to apply to the FCC in mid-1972 to relocate the studios from Hay Springs to Scottsbluff. This was finally accomplished after numerous years of bureaucratic delays in February, 1982 when we moved to Scottsbluff and significantly upgraded the KDUH operation. However, due to the absence of both network nonduplication protection and SYNDEX, we still found our audience, upon which our sales are based, diluted by the duplicating imported signals from Denver. Since that time, KDUH-TV has operated at or below a break-even basis from operations WITHOUT any contribution toward Overhead such as accounting, taxes, insurance, postage, employee benefits, etc.

KDUH SALES PROBLEMS IN THE PANHANDLE

In a final effort to turn this losing situation around, I asked my daughter Helene and her husband Steve Duffy to move to Scottsbluff in January 1988 to try to salvage a very difficult financial situation. The 1987 DIRECT OPERATING LOSS (excluding Overhead) was $250,000. Through massive efforts they were able to make significant financial improvements at KDUH. However, Steve Duffy informed me almost immediately that he was faced by competition for revenues including the Scottsbluff Star-Herald and the local radio stations who pointed out that anybody who bought local advertising on KDUH was not getting their local commercials on the duplicated ABC programming being carried on Channel 9 KUSA from Denver. This fact was used by the KDUH-TV competitors to keep our local sales artificially low. Steve's future prospects were based on the FCC's approval of the Network Nonduplication and SYNDEX Rules in mid-1988 to go into effect in August 1989 (and which were subsequently delayed until January 1, 1990). Steve's goal was to see if KDUH sales could be improved to the point where KDUH could make a Direct Operating Profit and contribute something toward the company's Overhead. So far this fiscal year (5 months), KDUH-TV is at a break-even point without any contribution to Overhead.

POSSIBLE SOLUTIONS

What can be done to alleviate the apparent dissatisfaction in the Nebraska Panhandle caused by the imposition of the new Network Nonduplication and Syndicated Exclusivity Rules as of January 1, 1990? After an initial flurry with the changes in the status quo in early January, the Syndex/Net Nondup controversy has subsided in both Wyoming and South Dakota where we also have television stations. It seems strange to me that this controversy is being fanned in only a handful of areas in the ENTIRE United States.

From visiting with other broadcasters around the country it appears that the major problems seem to center almost exclusively around TCI systems and the subscriber complaints seem to be directed mainly at U.S. SENATORS SERVING ON THE COMMERCE COMMITTEE.

ALTERNATE PROGRAMMING

First of all, TCI can provide ALTERNATE PROGRAMMING to increase the diversity available to their paying subscribers. Basically, only two Denver network channels are affected--KUSA (ABC) and KMGH (CBS). KCNC (NBC) in Denver, is NOT affected by network nonduplication protection and not at all by KDUH-TV SYNDEX requests. TCI can provide the Financial News Network (FNN) at an approximate cost of 3 cents per subscriber per month. (TCI, being the largest cable owner in the country and with revenues in excess of THREE BILLION dollars, can use its market power to negotiate the lowest program rates as they have with most other programming services.) Other alternatives could include the new comedy channels or religious channels from the many options available. In addition, TCI could bring in the super stations from New York City (WWOR-TV), from Chicago (WGN-TV) and Atlanta (WTBS-TV) to provide additional entertainment programming. These stations claim to be SYNDEX proof and, as independents, have NO NETWORK DUPLICATION problem.

This is the most obvious solution and the one that would provide an answer to the question as to why TCI raised its basic rates in December (knowing full well that SYNDEX was to go into effect January 1) and then blame the FCC and the local stations for the loss of two channels of duplicated network programming to their subscribers WITHOUT an appropriate reduction in the subscriber fee. We have heard complaints about the loss of two Denver signals without a corresponding cut in basic cable fees. We now expect to see TCI to RAISE their basic rates again if two channels are added to replace the two duplicated Denver network stations.

LOCAL STATION FLOP-OVER

Secondly, TCI can _easily_ carry the KDUH signal in place of the _simultaneous_ Denver ABC signal. This is the traditional method that TCI and the cable industry has used for the last 25 years to provide network nonduplication protection for the local stations. This would remove the blank screen or the sign on the screen blaming the local station requesting the pre-emption of the Denver signals.

Since OVER SEVENTY-ONE PERCENT of the ABC and CBS programs are carried simultaneously by KDUH and KSTF-TV, this would remove that percentage of the irritation and do much to alleviate the problem. The equipment is now owned and available to TCI either in the Nebraska Panhandle or at least in neighboring TCI systems such as Rapid City. We would offer the services of our technical people to work with them in the installation of the equipment and assistance in providing programming information to them to reduce subscriber irritation.

ACCURATE SWITCHING

As previously discussed, switching ONLY during the commercial breaks between programs would alleviate many subscriber complaints to Congress.

CABLE/BROADCAST COOPERATION

Finally, TCI can cooperate with the local stations to provide the best possible LOCAL signals for their subscribers. In Rapid City, KOTA-TV is providing a direct feed to the TCI headend. We are in the process of providing a direct KDUH-TV signal to the TCI headend in Scottsbluff-Gering bypassing our transmitter so that the cable would not be affected by infrequent REA outages. The Alliance Cable Television Committee has urged us to meet with the Alliance TCI manager and try to improve our signal on the cable. Decent antennas and modern signal processors (total cost of $1,000) would do much to alleviate the quality question. Obviously this can happen ONLY if TCI wishes it to. In this case, we implore your assistance to help us resolve these continuing quality problems with TCI.

We are willing to meet with representatives of TCI and try to resolve any problems. However, a little television station with revenues approximating a 3,000 subscriber cable system has little leverage in negotiating with a three billion dollar giant UNLESS Washington public policy pressures the giant to do so.

SUMMARY

KDUH-TV is in fragile financial circumstances. We can't wait until the station is forced off the air to realize that indeed there was significant problem. I would expect you to be concerned about the third of the families in the Nebraska Panhandle who are NOT CATV subscribers, either by choice or by the unavailability of cable to them. They are dependent on KDUH-TV and KSTF-TV for their television. Also, all of the residents of the Panhandle get their local Nebraska news, weather, sports, community events and political affairs from the LOCAL Nebraska stations and not from the Denver stations. The continuation of free local TV in the smaller television markets should also be your primary concern.

Senator INOUYE. I thank you very much, Mr. Duhamel.

Now may I call on Mr. Rockey.

STATEMENT OF TRAVIS ROCKEY, CORDILLERA COMMUNICATION, BILLINGS, MT

Mr. ROCKEY. I thank the Chairman for allowing me the chance to speak on this important issue with Members of the subcommittee. Like my colleague, Bill Duhamel, I operate television stations in the Western United States, including Colorado, Idaho and Montana. My comments here today will focus on our most recent experience in Montana where many of the complaints about Syndex and nonduplication rules have been lodged.

As the subcommittee may know, there is a Pacific time zone change of one hour between Montana and Eastern Washington. There is also a network delay of one hour in the Rocky Mountain time zone. Viewers on cable systems in Northern and Western Montana, therefore, have had until recently a two-hour difference between programming aired in the two states.

Under the new rules which went into effect on January 1, stations in Northern and Western Montana are now protected from Spokane, Washington stations who previously took away viewers of our programs. Without these protections, those lost viewers resulted in less revenue for us and affected our ability to provide local public service, news and other programming. These are services which the Spokane stations have never provided to our region and which we hopefully will now be able to enhance for our viewers.

Unfortunately, instead of replacing the loss of Spokane channels with other cable programming, various cable systems, including TCI, the largest cable operator in Montana, decided to replace the Spokane channels with blacked out screens during times when network and syndicated programming were duplicated. Of note is the fact that those blacked out screens contained messages that blame the local broadcaster for signal loss.

When this happened, it quickly became apparent to me that TCI cable was bent on stirring up the emotions of our audience in order to attempt to over turn the FCC decision. The result of their actions has been a number of unfortunate events which happened to us and other broadcasters throughout Montana.

In northern and western Montana these events included both our stations in Missoula and Great Falls, as well as the competitor's station in Kalispell, Montana, receiving bomb threats. One of the callers was actually arrested by Kalispell police after allegedly calling in a bomb threat.

Many of our employees were verbally abused on the streets in each town where we do business, advertisers on our stations were boycotted, and we have reason to believe that petitions to the FCC requesting modification of the syndex rules for northern and western Montana were coordinated by TCI Cable.

As you may know, TCI now says it will replace the Spokane stations with alternative programming by April 1, but the damage to broadcasters may be difficult to repair.

Why did this happen? Is it because we exercised our rights as affiliates of various networks to maintain that exclusivity in our region, or is there some larger political reason? That is an issue you may wish to follow up on.

Mr. Chairman, the cable operators in Montana and elsewhere had full knowledge of the likelihood of syndex and network non-duplication rules being reinstated a full 19 months before the January 1 deadline. These rules were designed with three major benefits in mind.

First, the public would receive more diverse programming. Second, cable operators could discontinue having to carry duplicative programs, thus giving them additional channels for new programming services. And, third, broadcasters would have their rightfully-negotiated exclusivity in the marketplace, exclusivity which they contracted for and which they pay for.

Undoubtedly some viewers are inconvenienced by the new rules as they adjust to watching one offering of a network's programs, but these rules in no way deny anyone the same shows they have watched before, as well as giving cable operators the opportunity, if they choose to accept it, of providing more diverse programming to their subscribers.

The bottom line is that the viewers of cable programming in western and northern Montana could have been welcomed into the new world of syndex and network non-duplication with new viewing options. Instead, we believe that the public was needlessly abused and allowed to be whipped into an emotional frenzy by the change in cable service blamed on broadcasters.

Had TCI used syndex to viewers' advantage instead of its own political advantage and had TCI not been a monopoly in its market, it would not have acted so irresponsibly and we would not be sitting here today.

Mr. Chairman, I urge you to reject any thoughts of lifting these important FCC rules and instead concentrate your energies on making cable systems behave more responsibly. While you do this, we will continue to provide quality news, public affairs, and community information services to our audience, services they can only receive from local broadcast stations.

Thank you.

[The statement follows:]

STATEMENT OF
Travis O. Rockey
Cordillera Communications, Inc.
Billings, Montana

I am President of Cordillera Communications, Inc. Cordillera, through various subsidiaries, owns five small medium-market television stations: KOAA (TV) Pueblo-Colorado Springs, Colorado; KIVI (TV), Nampa-Boise, Idaho; KXLF (TV) Butte, Montana; KRTV (TV) Great Falls, Montana; and KPAX (TV) Missoula, Montana.

Each of these stations provides a unique local service to its community of license and the surrounding area by presenting local news, sports, weather, public service and public affairs programming. It is my view that the ability of such stations to present this important local programming is threatened by the increasing market power of cable exemplified by the manner in which local cable television operators have handled implementation of the syndex and modified network nonduplication rules. My comments are based on events taking place in Montana before and after the implementation of these rules on January 1, 1990.

BACKGROUND:

SYNDEX AND NETWORK NON DUPLICATION RULES

Syndex and network non-duplication rules provide a win-win-win situation for the three most important elements involved in it: (1) for the public, they should provide more diverse programming fare; (2) for cable operators, the discontinuance of distant signals and substitution of new fare provides new reasons for viewers to sign up for their basic service; and (3) For local broadcasters, the rules allow them to enforce exclusive programming rights (for which they often pay dearly) just like every other provider of video services with whom they compete.

So how does this affect Montana?

TIME CHANGE AND DISTANT SIGNALS:

The history of cable television in Montana has been duplicate network signals. In Western and Northern Montana, (Missoula, Kalispell, Great Falls and the Hi-Line), network programming delayed by an hour from the network and another hour by the time change has given viewers a two-hour delayed signal from the Spokane network affiliates. In addition, PBS programming came from Spokane.

The reason these Spokane stations have been imported over the years is that under the FCC's prior network non-duplication rules local network affiliates could only obtainprotection against the importation of distant network affiliate signals whose network programs aired at the same time as the network programs aired by the local affiliate. Under the new rules that went into effect on January 1, local affiliates can contract with their network and enforce non-duplication protection against the importation of network programs on distant signals regardless of when the local and distant affiliates air their network's programming. The expanded protection offered by these new rules are extremely important to our stations. Under the old rules, we estimate our stations lost thousands of viewers to distant affiliates. Lost viewers translate into lost advertising revenues which, in turn, translate into less money to spend on local news and public affairs programming. And what do the distant affiliates to whom our viewers were lost contribute to our local communities and their economies? Nothing!

When these new rules went into effect, various Montana cable systems chose to drop the Spokane stations and the people in Western and Northwestern Montana lost the two-hour delay option to which they had become accustomed. They did not lose any network programming because the local network affiliates continued to serve the area. They did lose convenience, and this is what the bomb threats, advertiser boycotts, and petitions have been about. They should have gained more variety of programming. Telecommunications, Inc. (TCI), who controls approximately 90% of the cable households in Montana, decided differently and this is what I am here to testify about today.

OUR RELATIONSHIP WITH CABLE PRIOR TO SYNDEX:

Prior to January 1, 1990, most broadcasters in Montana had a good working relationship with cable operators. While there had been "turf" problems since cable started back in the 1960's, relationships were built over the last few years and a successful partnership was built between TCI and the three Great Falls' television stations to deliver the Great Falls' broadcast signals to the Hi-Line area of Montana in 1988.

In fact, at the same time that the Hi-Line partnership was announced in a press conference, which included conference calls with Montana's Congressional Delegation, TCI's representatives stated publicly that TCI was committed to "localism" for carrying broadcast stations. TCI representatives had stated earlier at a Fairmont Hot Springs meeting that TCI was embracing the syndex and modified network non-duplication rules that would allow TCI to rid themselves of the duplication of distant network signals. TCI was reminded of these comments in the attached letter from Stan Whitman, President of MDM Broadcasting, owner of the two television stations in Montana. (See Exhibit 1) *

On November 28, 1989 a meeting was held between TCI representatives, our station managers and myself in Helena to ensure a smooth transition on syndex and network non-duplication implementation. The cable representatives explained that while they had nineteen months to prepare for the new rules, they did not know what was going to happen on January 1, 1990. We agreed to continue to communicate on the subject as January 1 approached, to try and prevent the confusion and hard feelings experienced by the public when network non-duplication was implemented in the early 1970's.

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* The exhibits referred to were not reproducible.

Our position from the outset was to minimize the effect of syndex and network non-duplication on people throughout the state while maintaining the spirit of the new rules. The choices we discussed with TCI's representatives were to either:

> a) begin inserting alternate programming to replace distant signals effective January 1, 1990. This would give the public the diversity of programming the new rules were designed to give;
>
> OR,
>
> b) until the programming could be secured, tape delay the local network affiliate signals and replay them two hours later in place of the distant signals. We even offered assistance on the latter in the event that it was a problem for TCI in the short run. The TCI representatives indicated that a decision had not been made on what to do and they were looking for guidance in the coming weeks.

CABLE'S DECISION ON HANDLING SYNDEX AND NETWORK NON-DUPLICATION THROUGHOUT MONTANA:

Notwithstanding our prior discussions and offers to assist in providing a smooth transition to the new rules, cable in Montana, and TCI in particular, ultimately made the decision to approach implementation of the new rules with a very aggressive posture. They made it clear to people throughout the state that it was their intent to get the new rules modified or rescinded. TCI believed that with their monopoly position and extraordinary market power they could ignore the spirit of the rules while complying with the letter of them and force change. And they tried.

Why? To this date, we still have not gotten a plausible reason for the kind of treatment that the public as well as broadcasters, received beginning January 1.

TCI's Plan of Attack: A Full Frontal Assault on Broadcasters:

TCI used their unique monopoly position as well as significant financial resources to try to repeal the new rules and embarrass broadcasters at the same time. Below is a listing of events that took place during the month of January. All supporting documentation is attached.

1) On December 20, 1989, a commercial which came to be known as the "Cronkite Look Alike" was aggressively scheduled on all cable channels and ran until about the middle of January. The copy in the commercial was as follows: " We at TCI cable have been proud of the programming that we have been able to bring to you over the years including ESPN, WTBS and even the stations from Spokane, Washington. But effective January first, because of an FCC rule and the actions of local broadcast stations KPAX and KECI in Missoula, Montana, we must black out many of your favorite shows. We are sorry for your inconvenience."

2) Blacked out screens: effective January 1, channels carrying distant signals throughout the state were blacked out with the following messages appearing on the screen: In the Northwest Montana - Kalispell area: "FEDERAL REGULATION REQUIRES THIS PROGRAM BE BLACKED OUT AT THE REQUEST OF LOCAL TELEVISION STATION KCFW. WE APOLOGIZE FOR ANY INCONVENIENCE TO TCI CUSTOMERS." In Missoula the message read: "FEDERAL REGULATION REQUIRES THIS PROGRAM BE BLACKED OUT AT THE REQUEST OF A LOCAL TELEVISION STATION."

As you know, Federal Regulations never required cable companies to show blacked-out screens. TCI and other cable operators made the decision to do so as a direct attack on local broadcasters and the broadcasting industry.

Of note is the fact that instead of continuing to simulcast in Billings and Butte as TCI had done in the past, they blacked out the screen with the same message.

3) TCI employees were coached to give the following responses to callers inquiring what was going on with their blacked out channels. These comments are based on comments and letters to us from the public as well as our verification through calls to the local TCI cable operation in Missoula:

a) Pressure the local stations. They have control. TCI wants to continue to carry the Spokane stations but the local stations must withdraw their request for protection.

b) Call and write your Congressman. Get them to change the rule or make an exception for areas such as Western Montana.

c) The primary reason for stations' demand for protection is to increase advertising revenue. Local stations want to "make" people watch them. More viewers = more money for ads = greed.

d) Cable operators told callers that there is a petition drive and advertiser boycott in progress and many were actively solicited to participate.

e) Callers were told that if enough people boycotted the local TV stations and their advertisers, it was very likely that the local station would "smarten up" and let TCI carry the programs that the viewers wanted. During one three-week period, one advertiser on KPAX - the CBS affiliate in Missoula - spent as much as three hours a day on the phone trying to placate callers. Another received letters like the attached from First Federal Savings & Loan Association. (Exhibit 2).

4) Multi-media attack through advertising.

a) Attached are ads that ran in every newspaper in the area. (Exhibits 5 through 10).

b) Attached is an ad that appeared as a "bill stuffer" for TCI. (Exhibit 11).

c) Attached is an article written by Bob Thompson, Vice President of Government Relations for TCI, in which he repeatedly used inflammatory language such as "...SYNDEX allows TV stations to FORCE cable companies to black out certain programming...." TV stations have not forced cable companies to do anything. Cable companies decided to black out channels on their own instead of inserting alternative programming or taping the local station and replaying it at a later time. (Exhibit 12)

d) Attached is copy for a radio ad that ran on KYLT/KZOQ radio in Montana. (Exhibit 13).

5) News stories, attached, had TCI system managers pushing the company theme of repealing or modifying syndex. (Exhibits 14 through 24).

RESULTS OF TCI's ATTACK ON THE NEW RULES AND BROADCASTERS:

People in the Southwestern and Central parts of the State did not receive the same media blitz that the Northern part did. Because the Salt Lake signals had been simulcast, there were a few phone calls and an occasional letter to the local newspaper. In the Northern and Western parts of the state, the problem was much more severe.

The newspaper carried numerous letters, the majority of which attack broadcasters for being responsible for the blackouts. (Exhibits 25 through 41).

There were bomb threats to both our Missoula and Great Falls stations (Exhibit 42). KCFW in Kalispell received numerous bomb threats, to the point where police had to tap their phones. The police caught one caller and he was arrested.

Our station in Great Falls logged over 200 calls in a two week period of time with dozens of letters. Other stations in Great Falls had the same or more.

In Missoula, there were over 500 calls to our station and many letters. Eleven representative letters are attached. (Exhibit 43).

Our employees were verbally abused on the streets of each town in which we do business. Obviously, this created a morale problem for our station managers.

Advertisers were boycotted. During the months of January and February 1990, KCFW's local advertising revenue was off 50% from the same reported period in 1989 due to advertiser boycotts. As noted above, "TCI customers" called and harassed advertisers.

While it now appears that TCI will put alternate programming in place of the distant signals beginning April 1, the extraordinary damage they have caused local broadcasters will be extremely difficult to repair.

Why did TCI engage in this disruptive anti-broadcaster campaign? For some of the answers, I urge you and your colleagues to review carefully the filings of NAB, INTV and other broadcasters in the FCC's pending Notice of Inquiry concerning the cable industry. You will find there countless examples where cable, in competing with broadcasters for programming, viewers, and advertising revenues, has dropped, refused to carry and repositioned local broadcast stations or demanded compensation for carriage or channel positioning. Under the current regulatory scheme, not only is cable permitted to engage in these anticompetitive activities, it is also able to carry the programming of our local stations for free and extract monopoly profits from subscribers for doing so. I would suggest to you that cable's conduct in Montana in dealing with the introduction of the FCC's syndex and network non-duplication rules, when considered together with the other forms of anticompetitive activities I have attended to, provides strong evidence of why there is a dire need to reregulate cable.

SUMMARY

While the implementation of the FCC's new program exclusivity rules was bound to cause some temporary disruptions in subscriber viewing patterns, these short disruptions are far outweighed by the potential long term benefits of the rules, mainly providing greater diversity in program options for cable subscribers and helping to restore a competitive balance to the video market place. With respect to the specific problems that have arisen in Montana, while I believe they have been compounded by cable's inflammatory anti-broadcaster, anti-government rhetoric, we at Cordillera continue to stand ready to work with our cable counterparts to dispel the current problems that exist.

Thank you for letting me speak here today.

Senator **INOUYE**. Thank you, Mr. Rockey.

May I now call on Mr. Treeman.

STATEMENT OF JEFFREY C. TREEMAN, SENIOR VICE PRESIDENT AND CHIEF OPERATING OFFICER, UNITED VIDEO, INC., TULSA, OK

Mr. **TREEMAN**. Thank you, Mr. Chairman.

My name is Jeff Treeman. I am chief operating officer of United Video in Tulsa, Oklahoma. In that role I am responsible for the operations of four superstations which United Video distributes—WGN from Chicago, WPIX from New York, KTVT from Dallas-Ft. Worth, and KTLA from Los Angeles.

United vidos has a little different perspective than some of the other panel members. We are highly interested and highly involved observers in the syndex process because all of the four superstations that we distribute have been affected by syndex.

To give you some idea of the magnitude of the syndex rules on our business, we serve over 14,000 cable systems nationwide. These cable systems in turn provide the signals to 27 million cable homes in which almost 80 million Americans live.

We are also experts on syndex. We, the company, were founded under the syndex rules prior to their F.C.C. repeal in 1980, and we are now operating under the new syndex rules that recently went into effect.

Since I am the clean-up hitter on this panel, I am going to vary from my written statement because it contains a number of points that have already been made, and I would like to respond to several points that have been raised by others on the panel today.

First of all, I would like to talk about the transition period. Several people have commented on a 19-month transition period. If I could explain to you how complicated the operations of syndex are at the cable system level and for a carrier such as United Video, who is providing blackout-free programming, it is amazing that the cable industry mobilized within less than 45 days to be able to comply with the blackout rules.

As with most major issues that are in the courts, there is always a reluctance to go ahead and fully adopt a regulation because the courts have been known to change the regulation. It is a very expensive, complicated process to comply with syndex.

I think we see some costs to the public. Some of them have already been addressed. There are some that are unique to our business and the cable business. One cost which is obvious is the public loss of entire stations. To give you an idea of the magnitude of losses—(and it is not just TCI; there is no pattern and it is an economic problem for cable operators)—we have two services, actually three services that are not blackout-free.

For WPIX out of New York, we have lost 30 percent of the subscriber base since the blackouts began. We also carry KTVT out of Dallas-Ft. Worth. We have lost 40 percent of that subscriber base. That is cable operators' direct reaction to the effects of syndex regulations on their operations.

When we were preparing—and we did this within the 45-day time period—to provide WGN blackout-free, we went to our WGN customers and we said, "look, we understand this is a big problem for you. Give us your blackout notices so we can compare your notices to the programming that is scheduled for WGN." We received 15,000 blackout notices. They are entered in a very, very complex United Video data base.

In processing those 15,000 blackout notices, we found that the rate of erroneous notices, those notices which did not meet the complicated tests of the FCC regs, was 40 percent. In a number of cases you would have been asking the cable operator to pore through notices—this operator has not had that as part of his business previously—just to sort out mistakes that were dropped in his lap.

Now, a lot of these are unintentional mistakes. Some of them are intentional. But, to go back to Mr. Thomson's comments, I certainly think it was an unintended result of the syndex regulations.

The general public pays not only in lost stations but also in unnecessary blackouts. A number of cable operators take a blackout at face value. They are scared to death of incurring FCC penalties or getting in trouble with a broadcaster. So, they take a blackout notice and they say, yep, I have got to black it out. If there are too many erroneous blackout notices, sometimes decisions are made to drop the entire station because of blackout notices which may or may not all be valid.

Listings is another problem. We have fought the listings problem nationwide—that is, getting information into viewers' hands on what is going to be on their television screens. Back in the good old days before syndex, it was relatively simple. You got a schedule 60 days ahead, you transmitted that schedule to the listing services, they published it. There were changes, a few changes, but not many.

Now it is an ongoing problem for the public to be able to find out what is going to be on on distant signals where there is replacement programming or blackouts.

Mr. Thomson talked about the four costs to cable of distant signals. The transportation charges are not that high. We are basically in the transportation business as a satellite distributor. But when you add the copyright charges and the blackout administration charges and, on top of that, the blackout replacement charges, distant signals do get to be very expensive.

One other point that was introduced during one of the earlier statements was the fact that this is all free to the cable system. It is not free to the cable system. Cable systems pay copyright for distant signals. Currently cable system operators are paying syndicated exclusivity surcharges. So there is payment that runs back to the program holders for these signals.

I think I have hit the high points in illuminating some of the earlier testimony. What our wish would be is that when decisions and regulations such as the FCC syndex regs are made, with such an obvious impact on the general public, that input from the public be required. I want to add that United Video spent a lot of money having a couple of research projects done to measure the impact on the public. And those were contained in our FCC comments.

A certain amount of this has been predictable. We would like to urge that when major shifts in our country's telecommunications policies are made that a much longer transition period be granted and that everyone be given clearer guidelines as to how to accomplish all this.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF JEFFREY C. TREEMAN

SENIOR VICE PRESIDENT AND CHIEF OPERATING OFFICER

UNITED VIDEO, INC.

Mr. Chairman and members of the Committee, my name is Jeff Treeman. I am Chief Operating Officer of United Video Inc., and in that role am responsible for the operations of the four superstations that this company transmits via satellite. Thank you for inviting me to testify at today's hearing.

The superstations which United Video distributes are WGN from Chicago, WPIX from New York, KTVT from Dallas/Ft. Worth, and KTLA from Los Angeles. Of our four services, WGN, the Chicago station is by far the largest, reaching 24 million homes through 13,000 cable systems. WGN is also one of the oldest signals available to cable systems having been first transmitted by satellite in 1978.

In total, we serve 14,000 cable systems by delivering them these signals. These cable systems, in turn, provide these signals to 27 million homes in which almost 80 million U.S. television viewers reside.

United Video is well familiar with syndicated exclusivity rules, having been in operation under the old rules until their FCC repeal in 1980. We are now operating under the new rules.

Because of the importance of superstations to our overall business, United Video took on leadership role in the fight against syndicated exclusivity rules; first, during the regulatory proceedings at the FCC and later, during the legal challenge, which was decided against us. In this role, we have become experts in syndex regulations and in operations under them at both the satellite carrier and cable system levels. Our remarks today will focus on two areas in which the new syndicated exclusivity rules have had an effect: (1) effects on the general public, and (2) effects on the availability of imported signals to U.S. consumers.

SYNDICATED EXCLUSIVITY EFFECTS ON THE PUBLIC

Imported signals, which include national superstations and smaller regional stations, are carried by all but a miniscule minority of cable systems. Over 5,000 systems fall under the rules and these systems provide television entertainment to over 125 million U.S. television viewers. The rules exempted only 4% of all cable homes in the U.S. Syndex has been the most sweeping change ever seen by U.S. consumers on their television screens, and has changed the television programming fare for virtually every cable viewer served by a cable system of larger than 1,000 subscribers.

The impact from syndex on the general public would have been far greater were it not for the efforts of the cable industry and three major superstations who provided blackout free schedules. Major industry trade groups such as the National Cable Television Association (NCTA) and the

Community Antenna Television Association (CATA) provided their memberships with educational and public relations materials for use in local markets. Multiple system operators developed other programs. And as a result, most cable operators made successful efforts in their local markets to educate their customers to the coming programming changes and the reasons for them.

Much of the potential programming loss for television viewers was averted when United Video announced that WGN would be blackout free, Turner Broadcasting announced that TBS would be blackout free, and Eastern Microwave announced that WWOR would be blackout free. These three stations account for almost 70% of the distant signals carried in the country. For these firms to adopt this new form of operation required significant investments in operations and programming. But, by making long term investments to avert blackouts, the three firms removed those services from the syndex problem list for television viewers.

The remaining 30% of the distant signals received by viewers in the U.S. is divided among a number of other regional stations received by cable systems via microwave, satellite carriers, or off-air. For these much smaller services an investment in becoming blackout free is simply too costly.

I'd also like to call your attention to the very short timeframe in which industry mobilization took place. Only a month and a half elapsed between November 17, 1989 when the U.S. Court of Appeals upheld the FCC rules and January 1, 1990 when the first blackouts were required.

What the general public will never know about is the massive legal, administrative, and technical job forced on the cable industry in this short timeframe by the syndex rules. United Video received and reviewed 15,000 blackout notices from our customers.

One of the greatest costs of syndex paid for by the general public has been the loss of entire stations on their cable system. To those homes where entire stations are lost, the losses are more severe than merely the duplicated programming, the target of syndex rules. Those homes also lose all the unduplicated programming from those signals.

National statistics have yet to be gathered on the number of stations dropped. However, we can use United Video's experience with WPIX and KTVT services (neither of which are blackout free) as an indicator.

As a result of syndex rules, United Video has experienced a 20% loss in the number of households receiving WPIX, a loss of 300,000 households. We are also able to estimate that an additional 1.5 million households who received the WPIX signal from other carriers via microwave also lost that service entirely. Losses for KTVT, the Dallas/Ft. Worth station, were 200,000 households or 40% of the pre-syndex total. In polling our cable system customers, United Video has discovered many operators who are taking a "wait and see" attitude concerning continued carriage; who are delaying a final decision until later in the year. As a result, we feel additional losses for these services may increase the total by another 10%-15% within the next nine months.

I believe that it's possible that syndex-caused losses for imported signals which require blackouts will reach 40%-50% of the pre-syndex household total. That means up to half of the homes receiving a station before syndex will lose it.

But, it's hard to blame the cable system operator for this loss. For in addition to the administrative, legal, and switching burdens of syndex, a cable system operator must concern himself with potential liabilities in continuing to carry an imported signal and do the blackout work himself. One of United Video's customers who dropped WPIX expressed this concern very clearly in a letter to us. The cable operator explained...

> "With the high percentage of inaccurate and illegal notices now being sent throughout the United States, the [cable operator's] task becomes doubly difficult and probably impossible to monitor with complete accuracy.

> In an effort to follow the law which places responsibility completely and unfairly on the cable system operator, the operator will tend to err on the side of too much blackout -- thereby blacking out popular programming and dropping distant signals needlessly, needlessly depriving their customers of some of the most popular programming available."

When the former FCC Chairman Dennis Patrick was asked about the possible losses of whole signals to cable viewers, he responded that there shouldn't be any losses of whole signals, that plenty of replacement programming was available. That response overlooked the root of the syndex problem. Replacement programming is readily available to cable operators. What's so costly and time consuming in operating under syndex rules is handling the blackout notices, trying to make order out of the chaotic regulatory requirements, and fighting legal skirmishes needed to keep from blacking out programs to which a broadcaster thinks or pretends he has valid syndex rights, but doesn't.

Another loss to the public has been the schedule diversity offered by imported signals. One of the raging debates during the syndex regulatory proceedings was over what effects (if any) duplicated programming had on local broadcasters' audience levels. During the regulatory proceedings no substantiating proof was introduced that the audience for one show is to any level of significance composed of the same households as the audience for that show in another time slot. It's simply not clear. What is clear is that television viewers as a result of syndex will only have the availability of a syndex protected program from local television. For many viewers, having optional times meant having quality shows available earlier or later, outside the traditional dayparts scheduled locally.

Right now it's too early to total up the final list of losses to the U.S. television viewers. It will take several more months for the syndex dust to settle enough to see exactly how many signals have been dropped, exactly how much the cable industry has paid for compliance, and exactly how much United Video costs have increased. But, even now it's clear that syndicated exclusivity has cost the general public plenty.

THE EFFECTS OF SYNDICATED EXCLUSIVITY ON THE IMPORTED STATION BUSINESS

The effects of blackouts have divided imported stations into two distinct classes, those who provide blackout-free transmission and those who require the cable system operator to assume the full burden of syndex. United Video finds itself distributing services on both sides of the syndex fence. The New York, Dallas/Ft. Worth, and Los Angeles stations require blackouts. WGN, the Chicago station, is provided to cable systems with no blackouts.

A majority of our WGN customers requested that United Video take the necessary steps to provide the service with no programming subject to syndex blackouts. In order to provide this, United Video assumed full responsibility for those tasks placed on cable operators by syndex rules. It was either that or watch the WGN service shrink into the future.

Financially the impact of adding all this to our existing operations is considerable. We have increased our annual operating expenses by 35% in order to pay for the added staff and workload. This investment is a long term investment for us, for it will take several years of growth for us to recapture our costs of dealing with syndex.

So, syndex has changed the economics of imported signals, too. Those which are distributed to a smaller number of regionally limited homes have, at best, lost any future growth and may struggle to continue to be carried outside their local market. Those that invested in blackout free operations have a brighter future, but much larger expenses.

* * *

Throughout the regulatory and legal proceedings United Video has consistently urged and argued the public interest aspects of the syndex issue. In fact, we were the only respondent in the proceedings that took the time, trouble, and expense to develop direct consumer research to investigate public attitudes and behavior concerning imported signals.

United Video operates under legislative and regulatory provisions for satellite common carriers, and although we like to think of ourselves in a more flattering light than the word "common," we take our role seriously in providing services to millions of U.S. television viewers. As evidence to the value of our role, we can cite the number of cable systems that carry our services, the number of television viewers who watch those services, and the highly favorable opinions that those same viewers have of them.

Mr. Chairman, United Video has survived the challenges created by the imposition of syndicated exclusivity rules on our operations. Some of the costs of syndication are already evident: costs to us, costs to the cable industry, and costs to the general public. On the other hand, so far there isn't the merest shred of evidence that the public has benefited any from syndex rules.

What we ask at this particular point in the evolution of U.S. communications policy is for more emphasis on the public's interest. The U.S. has the technology and science to bounce signals off a satellite like BB's off a sidewalk, but the regulatory decision on syndex was made with no measurement of the impact on the public. Why can't we use technology and science to find out what regulations like syndex will do in the real world?

With such an emphasis on public impact, syndicated exclusivity rules might never have been approved by the FCC. And, with such an emphasis, businesses such as ours would find they could continue to operate under a simple, straightforward business premise -- giving the public what they want at a reasonable rate.

Thank you for your interest in syndicated exclusivity, we look forward to working with you and members of this committee on this situation in the future.

Senator INOUYE. I thank you very much. We have heard from broadcast executives. We have heard from cable operators and their executives. And now we will hear via video one of the viewers. We are holding this hearing is because of people like Mr. Brandt. So now may I call upon Mr. Gary Brandt of Scottsbluff, Nebraska.

STATEMENT OF GARY BRANDT, SCOTTSBLUFF, NE

[Videotape shown.]
[The statement follows:]

TESTIMONY OF GARY BRANDT
SCOTTSBLUFF, NEBRASKA

I am testifying on behalf of the citizens in Scottsbluff, Nebraska.

I want to thank the Honorable Senator James Exon for requesting this hearing and our thanks also to the Honorable Senator Daniel Inouye for granting the request.

There is a third interest here.

I. I would first like to address resolution passed by the Scottsbluff City Council on December 18, 1989, with a 4-1 vote:

"1. It has come to the attention of the Council that the Federal Communications Commission proposes to put into effect a Syndicated Exclusivity Rule regarding cable television. The Council believes that the implementation of this rule will have a detrimental effect on the population of Scottsbluff, Nebraska in that the implementation of these rules will restrict the ability of Scottsbluff residents to view Denver, Colorado commercial channels which are presently being carried on the cable system viewed by residents of Scottsbluff. The Council is concerned that this state of affairs may motivate the cable franchisee to cease carrying some or all of these stations altogether which will have the effect of isolating the residents of the City of Scottsbluff".

The council passed this resolution due to the volume of concern expressed by their constituents. I am including a copy of this resolution as part of this testimony.

The Scottsbluff City Council has granted TCI a non-exclusive franchise. This means any other cable company could enter the local market at anytime.

These are some of the concerns of the citizens:

Testimony (cont.)

II. Western Nebraska is only 200 miles from Denver, Colorado, and is heavily reliant upon this metropolitan area for news, cultural activities, sports, shopping and medical treatment. We rely upon Denver for these services, since our larger metropolitan areas in Nebraska are Lincoln and Omaha, some 400 miles and 450 miles away, respectively. We have already lost the Denver Post on a daily basis (Sunday availability only), and the Rocky Mountain News permanently. If Syndex continues, TCI, in all probability, would drop KMGH and KUSA, the two network stations from Denver with the same network programming as our two local stations. We have been receiving these signals for the last 25 years.

III. The local stations, Channel 10 and Channel 4, receive their programming from microwave hopping, which has become obsolete in comparison to satellite broadcasting and receiving. The microwave transmission is affected by convection heating, rain and snow. Since local broadcast programming is received via microwave from parent stations, and the cable channels, including the Denver stations, are received via satellite and then broadcast to our homes with no affect by the weather, the quality of the TV signals from our local stations are far inferior to the Denver stations (KUSA and KMGH), which are blacked out.

The Denver stations use state of the art equipment, while the local broadcasters use inferior equipment which is usually held together with a Band-Aid. For example, on March 4, 1990, while watching a program on local Channel 10, the sound became unbearable for listening because of the poor broadcast signal quality.

The next night was local Channel 4's turn for poor picture quality. Incidentally, Channel 4 relinquished its blackout of the Denver station during their broadcast difficulties. Channel 4 has difficulties on a regular basis.

II. (cont.)
Older people with failing eyesight have also expressed their difficulty in viewing local programming, due to such poor signal quality.

Signal quality is the biggest complaint of all the cable subscribers.

Also, most of the televisions made today (60% - 75% being a conservative estimate) are stereo compatible. Technologically superior equipment enables the Denver stations KUSA, KMGH, KCNC and KRMA all to broadcast in stereo. The local educational channel has just started broadcasting in stereo here in the Panhandle. Tim Daniels, station manager for local KSTF Channel 10, indicated he would have to buy all new equipment if their station was to broadcast in stereo. Mr. Daniels also indicated it would be cost prohibitive. Mr. Dave Porter of TCI indicated they would start broadcasting the channels they receive in stereo at a conversion rate of approximately three channels per year, due to the cost.

Another item Congress will address is HDTV (High Denfinition Television). This type of broadcasting is not yet possible in the U. S. on a national scale because the type of signal has not been formulated and approved by the appropriate government bodies or agencies. It should be a relatively short time before the Japanese begin broadcasting HD signals for HDTV. As stated previously, our local station relies on the microwave hop system and does not have state of the art technology to broadcast in stereo, not to mention any plans for HDTV. Again, if the Syndex rules are left in place, the people in Western Nebraska will be left in the dark when it comes to up-to-date technology such as stereo or HDTV.

The FCC has not taken current technology into consideration in the Syndex ruling.

IV. The FCC has of late published "Recent Changes to the FCC's Program Exclusivity ***Questions and Answers***".

IV. (cont.)
This publication states "The Commission took these actions to ensure that the public receives, over the long run, the best possible television service". I submit to the Committee that this is not the case, based on a majority vote of the Scottsbluff City Council, the volume of "Letters to the Editor" in our local paper, the reliance of the local population on the Denver Metropolitan area, and the inferior signal quality of our local stations.

V. KDUH, our local Channel 4, has not been protected since 1982 with the non-duplication regulation. They have stayed in business even with a poor quality broadcast signal. This in itself points to the fact this FCC rule is not necessary in our rural location.

VI. In regard to the monopoly theory of cable TV: There is a new player on the field, which is Sky Cable. Sky Cable is a direct broadcast satellite venture by NBC, Cablevision Systems Corporation, Hughes Communications and Rupert Murdoch's News Corporation, which are major players in the broadcast industry. The service is scheduled to appear in 1993. Basically, this is service that would beam 108 channels from a satellite directly to homes using a small, flat antenna which would cost approximately $300. TCI stock dropped 15% a share, ATC stock fell 11% a share and Comcast stock slipped 15% a share in mid February, 1990, with Wall Street investors taking this competition seriously.

Cable is a luxury, not a necessity such as electricity, natural gas or telephone service. Individuals may make a choice of watching local programming, cable programming, renting a VCR tape, going to a movie, or participating in a variety of other activities which do not include watching television.

VII. The most important intrusion is the loss of watching the evening news on CBS/ABC.

VII. (cont.)
Our local stations air these particular news shows at 5:00 P. M. Being a professional businessman, I am seldom home at 5:00 P.M., and am forced to miss those news broadcasts aired at that time. The Denver stations air the CBS News at 5:30 P. M. and the ABC News at 6:00 P.M.

One correlation to this is the question of why the same logic does not apply to newspapers? Two or three different newspapers in the same market carrying the same story from the same wire service are not required to follow rules similar to those formulated by the FCC. News is news. This is against the Bill of Rights!

VIII. The inconvenience of changing a schedule to watch certain programs is a problem. For example, "Entertainment Tonight" is on at 6:30 P.M. on KUSA from Denver. This was one of my favorite shows, yet I must wait until 11:05 P.M. to view it on our local channel. Since I usually retire between 9:30 or 10:00 P.M., must I miss this program as a result of the FCC shuffling? Even if I recorded all the programs being shuffled, I would soon wear out my VCR, and would still be stuck with poor picture and sound quality. This is a major concern of most of the local citizens. Is this in the consumer's best interest?

IX. In summary, I believe the FCC did not realize it would adversely affect Western Nebraska. In large metropolitan areas this regulation has some merit. However, living in an isolated area of Western Nebraska, consumers like the culture, entertainment, etc. from a larger city such as Denver.

The regulation is unfair to the citizens of Western Nebraska because of the poor quality of local television signals due to their dated equipment, lack of technology in the local stations which would enable viewers to receive stereo broadcasting, despite the fact 60% to 75% of the television sets are equipped to receive such broadcasting, the potential competition from Sky

Cable and Cable's current competition, and the dim outlook for other new technology such as HDTV, if the FCC non-duplication/Syndex rule remains in effect.

I would suggest a compromise. I am sure the Committee has heard this term before. I would suggest that you "Grandfather" distant stations of 175 miles or more, or raise your subscriber limit from 1,000 to 10,000 subscribers, if a dependency is clearly shown, such as has been presented by the citizens of Scottsbluff on Denver. I think a compromise along these lines would be acceptable to isolated areas such as Western Nebraska, and would keep the intentions of the non-duplication/Syndex rules in effect in more populated areas where these rules are, in all probability, fair and do aid the consumer.

Thank you for the opportunity to testify on behalf of the citizens of Scottsbluff, Nebraska.

Senator INOUYE. Mr. Brandt, in behalf of the Committee, I thank you very much.

I believe we have just seen history made. If I am not mistaken, this is the first time this Subcommittee has received testimony via video cassette.

Since this hearing was called in response to a special request submitted by the distinguished Senator from Nebraska, Senator Exon, I will call upon him to lead off in the questioning.

Senator EXON. Thank you very much, Mr. Chairman, and thank you for allowing Mr. Brandt to testify by videotape this morning. I am sure this will not be commonplace. But the reason that the witness who we just heard, Gary Brandt, could not be here this morning was that he could not afford to come, since this is the organization that deregulated the airlines, which is heralded in the population centers of the country, but it is not heralded in Scottsbluff, Nebraska, I can assure you.

I thought the testimony has been very good this morning. Just let me say that. I am afraid that all sides in this proposition do not quite understand all the complexities and the differing points of view that come into play here.

What you people in the industry have to understand, though, not only representing what is right for America in the whole matter of communications, we also have a major and primary obligation to the public out there. That is why I thought, Mr. Chairman, it was tremendously important that the public be heard on this thing in addition to those of you who I want to compliment on doing an excellent job, I think, overall in the matter of communications.

We heard suggestions from Mr. Brandt that we ought to have a compromise. I would certainly hope that something like that could be worked out. We have heard one or two hints of possible compromise. But in listening to the witnesses—and I have not had a chance to read all of their written testimony—it does not seem to me that there is a lot of enthusiasm or possibilities among the witnesses here that we can work some kind of a compromise.

Do I hear you wrong or did I not listen carefully enough?

Mr. THOMSON. Compromise is always possible. I think that is the way our company looks at it.

There has to be the right atmosphere, however. And when issues of program exclusivity are at stake we are particularly concerned when the National Association of Broadcasters and the INTV, the Independent Television Association, are up here urging on the Congress to take away our right to bargain for exclusivity. That more or less sours the atmosphere.

But I will say that I am sure my company and others, particularly with your encouragement and that of Senator Burns, will try to rise above that. I do know that we have excellent relationships with Mr. Rockey. We have a longstanding relationship with Mr. Duhamel, which has run hot and cold, wouldn't you say, Bill, is the way to describe it?

Mr. DUHAMEL. It has been difficult.

Mr. THOMSON. Difficult at times. And it is always possible to talk these things through, as I mentioned. There are specific problems which we needed to deal with before we could really work toward substitute programming, and that has caused some of the problem which Mr. Rockey talked about.

We could not really, at the point the rule came into effect, substitute programming or we would have had to stop immediately carrying the PBS station for no charge. Instead, what we did was put on the screen a notification that the local broadcaster had in fact requested syndicated exclusivity and it was pursuant to FCC rule.

People feel strongly, particularly in Montana and Scottsbluff, about their distant television. They have enjoyed it for 30 years. There is no way we are going to be able to keep a secret from the people in Montana or the people in Scottsbluff about why all of a sudden these programs disappeared.

But there was no conspiracy at work here. I mean, there was just the practical workings and the economics of this particular decisionmaking process.

Mr. ROCKEY. Senator Exon, I would also say that our relationship with TCI has generally been, I would characterize it, good, and we have actually a joint venture with TCI and the three broadcasting stations in Great Falls, Montana, to cover the high line of Montana. As you may know, the Great Falls area and the Great Falls ADI is larger than the State of Pennsylvania, so it really is quite a challenge.

The thing that I would say is—and I want to make sure of this point—that with TCI we worked with these people very closely as we came into the syndex period. We had meetings as late as November 28. We had conversations with their State managers and with their people all the way through up until January 1.

What really surprised us, Senator, though, was we were looking for compromise. We were trying to find a way to solve this problem because we knew that back in 1972, when the rules went in place back then, that there was a lot of problems in Montana. What surprised us was the way that TCI reacted to the syndex imposition. I mean, there was lots of newspaper ads, radio ads. I mean, it was a very aggressive campaign, almost against the broadcasters. And, frankly, we just had to assume by looking at all this that there was another agenda that we did not understand. So I think my testimony tried to point that out, and that was what happened.

Senator EXON. Mr. Rockey, when you have a little more experience in this area that we in politics understand, we know something about negative type of campaigns. We have seen them in politics on frequent occasions. I did not know of what you just told me. I would hope that those in the communications industry would not try and outdo one another with negative campaign techniques.

But from what I understand, whether it is true or not, you are at least alleging that campaign techniques that we in politics call negative were used, in your opinion, to stir up the public on this matter?

Mr. ROCKEY. I would say that was correct. And frankly we took a passive position. Our feeling was that this thing would pass and that TCI would respond with alternative programming quickly, so we kind of moved in that direction, sir.

Senator EXON. I suggest that you get off of the passive position. I took passive positions on that type of advertising all during my political career, but I frankly say that I am in a race right now where I think that is going to have to change because the dynamics have changed.

I would have to say and advise you, Mr. Rockey, as someone in the advertising business, that you know those of us who are attacked with negative type of ads, even though we have never used them before, have to be in a position to respond. My free advice to you is if that happens again you had better respond in kind or you could unfortunately lose.

Whether that is right or wrong is not the question, but you had better take care of yourself.

Mr. ROCKEY. I am sure we will do it, Senator.

Mr. THOMSON. Senator, I will categorically, strongly deny that TCI ever instituted that type of a negative campaign against the broadcasters in Montana. I have explained the circumstances and the delay in putting on substitute programming. There was a good reason for that.

Number two, I have explained that we did make the facts known about why people were receiving blacked-out signals. We explained the FCC rule and the fact that the local broadcasters had requested exclusivity. That cannot under any circumstances be construed as a "negative" campaign.

Mr. ROCKEY. Just one more comment, Senator, I would like to make, and that is that Mr. Thomson is absolutely correct. He personally did not—we did not have that problem with him. It was the local managers where the challenge really existed, and that is where the difficulty took place. It was communication from the corporate standpoint down to the local managers, and that is where the problem occurred.

Senator EXON. Thank you. Mr. Chairman, my time is up. I may have some further questions in the second round.

Senator INOUYE. Thank you. Senator Burns.

Senator BURNS. Thank you, Mr. Chairman. I just have a couple of questions. With regard to the question of negative advertising, it all depends on who is doing the defining. We could get around to that and talk about it all day.

By the way, I want to thank Bill and Travis and Bob for coming today because I think it puts some things on the table where it ought to be and how it should be discussed.

Mr. Thomson, I would ask of you, have you got a time frame on some of your substitute programming? Do you have a specific date on which TCI is planning to place substitute programming on its cable systems in Montana? What type of programming will be substituted? You might just lay out here what your plans are in that area.

Mr. THOMSON. Yes. I do not want to oversell it. People are still going to be dissatisfied because they really do not want substitute programming; they want what they had before. But in fact I think we can move toward a solution and I think within two weeks that we can be looking at partial substitutes—I will rephrase that. At least some of the channels that are blanked now will have substitute programming on them.

In addition to that, we are currently in some rather intense negotiations with programmers on some very attractive programming to fill the rest of the channels later on. Of course, what we are talking about, say in Great Falls, where we have four blacked-out channels, perhaps two will receive substitute programming right away, within two weeks or so. And the other two would receive substitute programming a little bit further along the line, maybe a month or two.

In the interim, we will be rebating a small amount of our subscribers' fees to account for those two blank channels that exist during the interim negotiating process.

Senator BURNS. While these negotiations are going on—and I will ask this of Mr. Duhamel and Mr. Rockey also—has there been progress made in these negotiations? Are you a little bit further down the road than you were say a year ago, or are we at a stalemate where we may have to go to a negotiator or a facilitator?

We have a firestorm out there.

Mr. THOMSON. Yes. As I said, we are never going to completely satisfy everybody. We can put in place a more attractive situation than what which we have now. I think, thanks to your good offices, you have obviously been a catalyst to get this type of negotiation going, and much of the credit for its progress is due to you.

I think that the best thing for us to do is to work like we have many, many times previously with your local broadcasters up there and come up with the best solution possible under the circumstances.

Senator BURNS. Bill, would you want to comment on that?

Mr. DUHAMEL. Well, I will tell you one of the problems is TCI—and I go back with TCI and Bob Magness back to the start. We used to meet in hotel rooms sitting on the bed because we did not have a suite in those days, at least he did not.

The problem I have got is that you can only negotiate with somebody if they choose to negotiate. KDUH down there in Scottsbluff, Nebraska, is the equivalent of a 3,000-subscriber cable system. That is about what our revenues are running. And you put that up against a $3 billion company, the only way that they are ever going to negotiate is if they choose to.

And they have not chosen to in the past with us. As I said to Bob Magness one time, Bob said to me, "Bill, you have caused us a lot of legal fees in dealing with the FCC." I said, "Bob, we do not have to do that. We can sit down and talk." He said, "Well, we are an aggressive company." That is how they got to be a $3 billion company.

Now Bob Thomson and I have visited this morning and we said we are willing to get together and try to work out some of these problems. But the thing that concerns me is the fact that I do not think the people in western Nebraska, Montana are that much different from the people in western South Dakota and Wyoming. We have not seen the kind of problems there, and the TCI system is there, and I do not understand why Scottsbluff became such a firestorm. Rapid City did not. South Dakota Cable has had no problems—they have had five inquiries, and they have all the Black Hills of South Dakota on cable systems. There have not been those kinds of problems other places.

And Scottsbluff is a major problem, Senator Exon, and I know Montana has been. But we are willing to sit down with TCI.

Senator BURNS. Travis?

Mr. ROCKEY. Senator, we continue ongoing talks with TCI. In fact, our people talk with them weekly. And what I would say is that it appears like we are at an end to this in terms of the alternative programming being substituted, and I think that from my position—from TCI's position it should be three more good reasons to subscribe to basic service for TCI. From our position it is a good situation, and I think we are maybe coming to a close here.

I hope it happens within the next two or three weeks so that when your hearings being out in Montana that some of the folks will feel better about what they are paying their $17 a month for.

Mr. THOMSON. Senator, if I could make one more comment, the thing, of course, that could upset this whole apple cart and change the atmosphere entirely is this whole issue of taking away cable's right to bargain for exclusivity.

A staff draft has been circulated in this Committee which in many, many circumstances would do precisely that. The staff draft says that if we have made investments to save Ted Turner from extinction for example that somehow that precludes us from signing an exclusive contract, programming contract, of the type that is being protected here for the broadcasters.

That is a ridiculous result. It should not prevail. Cable's right to do exclusive programming has to be secured as well.

Senator BURNS. Mr. Thomson, what would be your position if compulsory licensing was discontinued?

Mr. THOMSON. A really interesting question, one which requires a lot of study, and what I am going to say is sort of right off the top of my head.

Clearly if you want to move away from a must-carry environment that is sort of what has to be considered. I mean, these must-pay notions that are floating around that have utterly no credibility whatsoever except within the NAB are clearly not going to fly.

What you really have to talk about seriously is whether you would want to do away with the local compulsory license. I would offer my view that that would be very hurtful to the local broadcast community. Currently they have nothing to sell. They have no rights.

They have to go back to Hollywood and say please sell us rights so that we can in turn sell them to the cable company. They are going to get held up pretty good. And then they are going to come to us and say please buy my station, and we are going to say, gee, the station is available for free in our marketplace. How much would you pay for a product that is available for free in your marketplace to 98 percent of your customers. It is tough, very tough.

But I do think that what you are saying is a logical solution, if we want to move away from a must-carry environment.

Senator BURNS. Mr. Duhamel, do you have a comment on that?

Mr. DUHAMEL. No, not at this time. I do not want to take the time right now.

Senator BURNS. It sounds like I had better move to Tulsa.

Mr. EFFROS. Senator, if I may, to broaden the discussion a little from the particular problems in that area of the country, I would hope that you recognize that again looking at the problem nationwide and looking at the smaller systems all over the country that are faced with these problems, to ask system operators, for instance, to substitute individual programs, as I mentioned before, is technically very expensive.

But now we have legislation proposing that the local cable operator can only control X number of channels on the cable system, and the operators are calling me and saying, well, does that mean that we should not do substitution today because we might get hit by the government next week for doing that?

Indeed, exactly that happened when one cable operator got a lot of publicity for putting on their own programming on their own channel up in Rochester, New York, and did exactly what we thought the FCC was telling us they wanted us to do. The next thing we knew, all of the broadcast associations had filed petitions with the FCC to make it illegal.

So from the cable operator's point of view, it is quite understandable that they are reluctant to make all of these moves that everybody says are in the public interest here and in the public interest there without knowing that there is going to be some stability in the legal position that we take or in, frankly, the financial risks that we take.

We do not have that stability now. We are being told in numerous different ways that there is a threat to any programming that we might pay for, there is a threat to any control over channels that we might take, there is a threat to the amount of money that we can charge for the services that we create.

And until there is some stability I think it is not reasonable to ask, again particularly the smaller operators to be taking all the risks without any security that the legal landscape of today is still going to be the legal landscape of tomorrow.

Senator BURNS. I have always subscribed to the view that advancements in any industry and any problems industry has can be solved by market-driven forces, and I would like to see that in this situation. However, it looks like we are coming down to the funnel, where we might have gotten as far as we can go without some sort of action being taken.

But I think this question has come up, and I appreciate your views.

And thank you, Mr. Chairman.

Senator **Inouye**. Thank you, Senator Burns.

Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

Senator **Pressler**. Thank you very much. Let me say I am very proud of my constituent, Bill Duhamel. Where else but South Dakota do we have an econometrician running a TV station with a Ph.D.? So we are sure you apply those skills every day, those skills that you got as a Ph.D. from Stanford University.

In any event, I have read through all of your testimony. I apologize for being late. I have been working this morning on getting a historical designation for Fort Pierre, South Dakota, which is another project that is of importance to the people of Fort Pierre.

Mr. Chairman, thank you for calling this hearing on the FCC's syndicated exclusivity and network non-duplication rules The expansion of these rules on January 1st of this year caused a great deal of concern among cable television viewers in localities where additional blackouts resulted. Rapid City, South Dakota, is one of those localities. I am very glad to see Bill Duhamel, President of Duhamel Broadcasting Enterprises in Rapid City, here today to testify before this committee.

In Rapid City, and I believe this is true across the country, the main concern is not over the syndicated exclusivity rule, but over the network non-duplication, rule. There are cable systems that carry signals from distant network affiliates. Some, such as Rapid City, duplicate all three major networks in this way. In Rapid City, a cable subscriber can view ABC, CBS, and NBC from both the Rapid City and Denver affiliates.

It is understandable that a person will be upset when his viewing options are suddenly more limited. While all the blacked-out programs are still available on Rapid City cable, they are now available only at one time. Some flexibility has been lost to the viewer.

On the other hand, the broadcaster should have the same business right to buy exclusive programming as others in the business have. This right was restricted when this country had a legitimate public policy goal of assisting the growth of cable television. But cable televison is now a big industry, capable of standing on its own. At some point, exclusive contracts by broadcasters should again be honored. This hearing should help us determine if the FCC was right that this is the time.

Mr. Chairman, thank you again for calling this hearing. I look forward to this morning's testimony.

Bill Duhamel, I wanted to ask you a question, and anybody else can comment on this, and this also is to Mr. Thomson. We have had talk here, and the tape, which I am going to look at later, about the complaints regarding the quality of signal. But the tape is not on the quality of reception, but the quality of the signal they receive from their cable system.

Is this the fault of the cable system or the broadcaster? What do each of you do to maintain a high quality signal? I know you have covered some of this, but do you have anything to add to that?

Mr. **Duhamel**. Yes, I would like to. Thank you, Senator.

The fellow, Mr. Gary Brandt from Scottsbluff, had said that the local signals were the problem. It is interesting, after he prepared the testimony he visited with Mr. Tim Daniels, who is the manager of KSTF, and Tim Daniels asked him, "Have you ever looked at the local stations off the air?" And he says, "No, why should I? They are the same."

And the point is, all he is looking at, and when he makes those complaints, is the cable signals, and not off the air. Now we can talk about the off-the-air signal. We monitor it. We have engineers in Scottsbluff. I can punch it up in my office and look at it. And I look at it on a regular basis, and I am not seeing the kind of problems that Mr. Brandt is saying that are there.

Now this is one of the problems that—let me just say one other thing that we have done. There occasionally can be a problem with the antenna, where you get icing and it breaks off an element. So we hired a design engineer from Albuquerque to fly in and climb to the top of the 2,000-foot tower that we have north of Scottsbluff to inspect the antenna and make sure it was properly working, to make sure that the signal was not going in, say, 90 percent of the directions, and maybe just towards Scottsbluff there was a problem. He said that our antenna is just fine. We paid $6,000 to do that.

Now a problem we get into is we cannot get into the cable headends. They (ICI) keep telling us sometime in the future, to see what kind of equipment that they are using, to measure their signal, the off-the-air versus the cable signal. And we need some kind of (cable) standards.

Now I talked to the South Dakota Cable chief tech, and asked him how he goes about setting up the local signals off the air. He is a very good technician, and he says, "I use the eyeball method." I cringe when somebody says they use the "eyeball method".

I do not want to attribute motives, but TCI is selling local advertising in competition. And they have every good reason to switch people from the local stations over to the satellite-fed stations.

Mr. **Thomson**. If I could respond for a moment, Senator.

We do not have such incentive. Our business incentive is driven by the fact that people buy cable for two reasons. Number one, to get more variety. But almost as important, they buy cable in order to get a clearer picture of their local broadcast stations.

Our business incentive is to make sure that that second purpose is met. That, in fact, they do get a clearer reception of their local broadcast stations.

If there are particular problems with Alliance, Nebraska, which is a very small system, which Bill mentioned in his testimony, I am sure they can be corrected, as far as signal quality. But our business incentive is the same as Bill's, and that is to make sure his signal is as clear as possible.

One of the things we sell is an antenna service for broadcast stations. If we cannot perform that function, then people will not take cable, period.

Mr. **Duhamel**. Senator, I think if we could get back to the cooperation. If we can sit down and work with them, and they will work with us, I think we can solve some of these things.

In Rapid City, we provide a direct signal to the cable head-end, the TCI cable head-end. We are in the process of doing that in Scottsbluff. We are doing that in Buffalo, Wyoming. We are trying to get some place in Alliance so that we can avoid some of these problems. And that is the spirit of cooperation that Senator Exon is trying to get to, too.

Mr. ROCKEY. Senator, I would just like to make one quick comment about western Montana. In Great Falls, Missoula, and Kalispell, we have a problem that we have been working on with the TCI people for some time. It is one of those problems that sort of gets fixed, but does not stay fixed.

And it is called direct broadcast interference. It comes about when the two signals come into the back of the television set, one through the cable and one coming over the air, and they come in at the same time, and there is leakage from the cable, and it interferes with the signal.

The net result is there is a line going down the center of your screen. And in the case of the broadcasters, not just our station, but KECI, which is the NBC affiliate in Missoula, there is a definite noticeable difference between the quality of our signals and the quality of signals that TCI is receiving by satellite.

Senator PRESSLER. What causes that line?

Mr. ROCKEY. That is part of the direct broadcast interference. That is the interference that we are talking about, is that line going down the center. I mean there is a substantial signal difference. And what is happening, quite frankly, the sales people who are selling for cable sell the fact that there is a difference in quality of the signal, our signal versus the signal that cable has.

They seem to be able, when we complain about it, they seem to be able to fix it. It lasts two or three weeks, and then we are right back to square one again. And so it is a constant problem, but it is a disadvantage that we have. Our signal over the air. We just spent $500,000 for a new transmitter in Missoula, Montana, our signal over the air is excellent. The problem is in the system.

Mr. THOMSON. It is not so much a problem with the cable system, DPI, direct pick up interference. And Travis is absolutely correct. What happens is the signal enters through our head-end, and then it also enters through the back of the TV set. And because the two signals are slightly out of phase, you get some ghosting.

Now this happens when we carry a channel "on-channel."

Senator PRESSLER. Some what?

Mr. THOMSON. Some ghosting in your picture. It is a problem that can happen if the system is not tight enough. If your connections and couplings are not tight enough. But it happens more often because of the television set itself.

The consumer product that is purchased from the stores, sometimes the connections inside the television, or where the cable connects to the television set are improper. And that means you have got, in effect, an antenna.

So it is not always the cable system's fault that we get DPI with on-channel carriage, not by any means.

Mr. DUHAMEL. Senator Pressler, this is not a problem in Scottsbluff or in Rapid City, because TCI does not carry us on-channel. If they were to carry us on-channel, on channel 3 or channel 4, we would have significant problems, and you would have this beat in there that would cause a problem, and that is why I just thank God we are not on-channel. We are on channel 4. Channel 3 in Rapid City is carried on channel 4, and channel 4 in Scottsbluff I think is on channel 9. And so it is not a problem.

Mr. EFFROS. Just to complicate this that much more, what was just stated, on both the broadcast side and the cable side is what the Commission used to call co-channel interference. If you try to put the cable channel on the same channel that the broadcast channel is on, and the television set is not shielded properly, you get two signals of the same type coming in almost simultaneously, but not quite simultaneously. That causes the ghosting.

It was for that reason that in 1972 the FCC did not require on-channel carriage of broadcast signals, and recognized that there may be a problem, indeed, and a detriment to the broadcaster if the cable operator carried them on-channel.

This just goes to the questions of must-carry and so on in other bills that are floating around Capitol Hill, that would simply require us to put broadcasters on channel, and then create more technical problems, which we would then be blamed for.

Senator PRESSLER. Now let me ask you this, Mr. Thomson. I have received complaints that the cable company sometimes begins blacking out a channel too early or too late. If you need to black out a show that starts at 6:00, why cannot you black it out at 6:00, or during the commercial break preceding that time? If you black out a channel five minutes early, the viewer suddenly loses the signal for a show he has been watching, and has to hunt for the other channel that is carrying it.

A similar problem occurs if a channel is blacked out five minutes after a program has started. Mr. Duhamel, you have told me that this has happened on some of the systems that you carry in your station, so I guess I will get Mr. Thomson's response.

Mr. THOMSON. As Mr. Effros referred to in his statement, these timing issues are not all precise. The clocks are not set on exactly the same point in the various broadcast locations. That is a problem.

Number two, there was clearly a transition problem as we started this, setting the timers so that there would be the exact black outs, and only the program that was supposed to be blacked out, was blacked out. There was a transition problem.

Thirdly, there is a problem with capital expenditures. Unlike Bill's small television station, which made a profit last year, our company did not. Or it is making a profit during the first five months of this fiscal year, as he says in his statement.

Mr. DUHAMEL. I said it is breaking even, without it contributing to overhead.

Mr. THOMSON. You are doing much better than we are, let me put it that way. Capital expenditures are a major concern in our company. We will report a loss in excess of $100 million in 1989. Much of that is for capital expenditures associated with upgrades and what have you in our systems.

We are trying to make do with temporary switching equipment until we can make the adjustments that are required by this law in economics—this regulation and the economic situation.

I think a lot of those issues that were mentioned by Bill in his testimony have been taken care of as we worked through the transition period into a Syndex world.

Mr. DUHAMEL. I think he is right. I think it has gotten better, except for this was some of the initial problems, particularly in Scottsbluff, that irritated the people, then they picked up the phone and they called the local cable operator, and the cable says we are required by the FCC to do this. Now here is the FCC's number and the Congress and the Senator's number.

And that was the irritant.

Now I do think it has gotten better. But there has been a number of complaints about that.

Mr. EFFROS. But let us add one more bit of reality to this. And everybody in this room has the experience here in Washington of watching a television station and there is a break-in for a little news summary or something that happens that is not anticipated. And the net result is the entire program day from the television station fades by one minute, or fades by two minutes.

Senator PRESSLER. That is not what I am talking about, though.

Mr. EFFROS. Well, I know that is not what you are talking about, but I am saying, from a cable operator's point of view who did set his or her timers correctly, all of a sudden every timer is wrong for that day. And these are the practical problems of trying to comply with FCC rules.

Mr. DUHAMEL. Actually, we have a good working relationship with the TCI manager in Rapid City, and say, if there is a sports overrun or there is some kind of a news deal that throws the schedule off, we call him up and we have both his home number and his office number, and he has a touch tone phone that he just releases programming.

It is like there is the example that Mr. Brandt mentioned about on March 7th, channel 4 had a problem. The REA had ice on the lines, the lines went down, and our diesel generator did not turn on. And so we were off the air for four hours while the REA went out and fixed the lines. And we had to get a new part for the diesel generator.

But, on the other hand, we called the TCI manager in Scottsbluff immediately and, as Mr. Brandt said, the signal was released so that it could get through there.

Mr. TREEMAN. Senator, I would like to raise a point in that connection. We refer to that operation as seamless switching. So that you have consumers that are not really aware of the switching. First of all, most broadcast stations are not entirely seamless. There are some variations in switching from time to time. You generally notice it when a station's I.D. is up there a little longer than seems reasonable.

We at United Video are switching signals. And one of the costs of Syndex into the future is going to be problems with switching. If a cable system operator is running three or four channels and substituting programming, he literally has to shake hands with the broadcaster on almost every switch to make sure that something has not happened in the intervening period so he can keep his switching seamless.

Senator **Pressler**. All right, my last question is to Mr. Thomson. When will you start running substitute programs in Rapid City?

Mr. **Thomson**. As I explained before your arrival, this is unfortunately bound up with our provision of lifeline white area network affiliate service to dish owners. We use the same transmission system. And in fact, the cable head-ends, the money they pay for the Denver programming, subsidizes that dish owner product.

It is for dish owners that cannot receive their local broadcast stations.

When we start dropping these distant signals, then that subsidy stream of revenue disappears, and that net link service is threatened. But I do think that we are working through that process, and we will be able to work with substitute programming some time in the near future, I would say a matter of weeks.

But I will say that this is not going to satisfy all of the consumers immediately. What they want is the programming they have now. Over the short term there is no question this network nondupe rule is an anti-consumer rule. Over the long term it is not, if it is applied even-handedly to both cable and broadcast.

Senator **Pressler**. Thank you very much.

I think these witnesses have really provided an excellent discussion of the issues.

Senator **Inouye**. Thank you.

Senator Exon.

Senator **Exon**. Mr. Chairman, thank you very much.

I thank the witnesses for their patience, their testimony that has been very informative and helpful. I will not tie you up for any length of time. I would like to ask a couple of questions.

I think you all heard William Johnson, the Deputy Chief of Mass Media for the FCC indicate he thought it would be a good idea as I suggested for the FCC rather than to take the hands-off attitude that they have maybe to come out and maybe referee some discussions out there in the Scottsbluff area or any other area.

Do you think, Bill, and do you think, Mr. Rockey, and do you think, Mr. Thomson, that would be a good idea?

Mr. **Duhamel**. I do not know that we would need the FCC to start with. I mean, Mr. Thomson has said he is willing to sit down and work with us and your office and try and see if we can come up with some things that would be of help to the people of the Scottsbluff area. If we got an impasse at that point, I think somebody like the FCC could be helpful.

Senator **Exon**. Would that be helpful out in your area, Mr. Rockey?

Mr. **Rockey**. Senator Burns has a meeting being held in Kalispell, Missoula and Great Falls. Around the middle of April it is scheduled. Roy Stewart, the FCC Mass Media Bureau Chief, is expected to be there along with Mr. Thomson and the Senator's aides, I think. Oh, and someone from the NAB. Jeff Bowman will be there also. So, I think that that may be a little opportunity to see how that works, sir.

Senator **Exon**. Good.

Bill, let me ask you and Mr. Rockey this one final question.

Do you broadcasters feel that there are different situations that we have to address? I guess one of the situations is where you have a program being broadcast simultaneously on a Denver television station and simultaneously, Bill, on your station in Scottsbluff? That is one situation.

What about the other situation where you have syndicated exclusive programs at different times. Therein lies some problems.

I presume that the first problem is when you are broadcasting the same program from the network and it is coming into Scottsbluff and Gering and all the other places simultaneously, that is your first concern, I assume, is that right?

Mr. **DUHAMEL**. That is the traditional way of—the non-duplication protection has been handled in the past, and that one would be fairly easy. It might involve a capital expenditure of a couple thousand dollars to get a better switcher to handle that and the blackout. You could do that, I think, for something on the order of $2,000 or $3,000 per headend.

Senator **EXON**. The other problem is more difficult. What is not being simulcast, I presume.

Mr. **DUHAMEL**. I think the problem there is that, you know, we are still struggling, and we go out and we have spent just at KDUH $60,000 a year for syndicated program rights. We try to schedule that when the people, you know—by Chicago standards that is not very much, but for out there that is a lot of money with a station that is just barely existing.

But when we buy that contractually, we try to schedule when we think the majority of the people in the Panhandle want to watch. If they do not, then we try to move it to a place or else get rid of the show.

In Denver, like the Donahue show, we have had it at 8:00 in the morning since 1976. Denver has moved it at least three different times and has moved it from one station to another down there. And at this point, you know, if we only had simultaneous protection if we wanted to get the value from the Donahue show, we would have to be sitting there reading TV Guide and trying to figure out who has got it in Denver and where they moved it. It would just play chaos with us.

Mr. **TREEMAN**. That is exactly what a cable operator has to do on syndex is figure out who has got it and when it is going to run.

Mr. **DUHAMEL**. We had suggested to TCI that there might be some kind of computer form that we could agree on that we could feed our stuff in to them so that they could help process it.

And I think that the stations would be willing to cooperate if you could get some kind of a clearinghouse so they could get their schedules through a computer because it is a lot easier for a computer to sort it than to do it by hand.

Mr. **ROCKEY**. Senator, I would say that each station serves its own market in its own unique way. And from our standpoint what happens in Spokane cannot be the same thing that happens in Missoula, Butte—Missoula, Great Falls and Kalispell. There are unique differences.

And it is because of that, I think, that in terms of serving the market we have to position our program in the best way we possibly can to serve the needs of the people that are local to us.

Mr. **THOMSON**. I guess I would just say in closing that this whole issue of syndicated exclusivity I think points up the problems that government runs into when it starts to issue regulations and rules and even statutes which impact people's television.

The type of negotiation which Bill and Travis and I have talked about which will take place in these two states is much superior. I have got to say even looking at it much more broadly with regard to some of the issues that have been brought to the attention of the committee regarding cable in its larger sense, you really should be looking at whether over the longer term the private marketplace is going to take care of those issues.

We have circulating now in your subcommittee or in your committee a staff draft which is really quite broad and complex in its scope. It would essentially wound this industry very, very badly, and I just wonder if over the longer term a private marketplace approach with some adjustment in our regulatory environment is not a much better way to go. I guess that is what I wanted to say in conclusion.

Senator EXON. Mr. Thomson, I will be taking a look at those bills. I have certainly not committed myself to any of those. I do not know whether any of the other members—I suspect the majority of the members of the committee have not.

The only problem that we have in this area that I think you should understand is that when we have problems that arise, when we have listeners in the Scottsbluff area—and there have been lots of them call this to our attention, the facts of the matter are they do not really want to understand what the problems are.

Mr. THOMSON. We field the same calls ourselves.

Senator EXON. And that is like all of us are in the marketplace. But I happen to feel that some of their concerns, many of them are legitimate. That is why I have called and pressed for you to get together and work it out.

My advice to you, free again, is that unless you people in the industry can get together and solve these problems, then whether you want us to or not, we are going to solve them up here or try to solve them, and when we do that we probably do not do nearly as good a job as you were doing in the first instance.

So it is the eternal wheel with a hamster running around in it, never quite catching up, but always there to gobble up some food when it comes in. So just let me urge you. The best way that we can stop reregulation or regulation of your industry is for you people not to solve the problems of our constituents, and we work for our constituents more so than we do for you.

But in the case of some people at this table, they are also my constituents. I think I have some broad understanding of the problems involved. I just encourage here and now once again as I have at most hearings like this that we have had, we are all in this together, and I believe that if we can work together we are not going to institute or at least ignite lots of threats, lots of considerations that are now being given to regulation.

Thank you for being here. It has been good testimony. Thank you, Mr. Chairman.

Senator INOUYE. Thank you very much.

I would like to make an observation because reference has been made to a so-called staff draft. As some of you are aware, I played a more than significant role in the deregulation of the cable industry bill to begin with, and I think it should be obvious to one and all that in recent months we have received many complaints via letters or telegrams or otherwise, and this committee could not just sit by and remain silent or neutral.

As a result, many bills were introduced, the most comprehensive the one by Senator Danforth, S. 1880, and there were many others on specific problems such as those introduced by Senator Gore and Senator Ford and Senator Exon and others.

I instructed my staff to get them all together to prepare a committee draft and proceed from there in our legislative process. We could easily have had hearings on all the bills and then Mr. Thomson would be screaming.

Mr. THOMSON. That is right.

Senator INOUYE. Because the committee draft lifted the cap on vertical integration, lifted the cap on subscribers which have affected TCI. I am sure you know that.

It also came forth with a national standard instead of a multiple, many hundreds standards on municipal and state. So what we have tried to do is come forth with a measure that can be used as a vehicle when we begin our hearing process.

So I hope that you will be balanced in your criticism against the staff bill. Otherwise, we may be forced to bring up the Danforth bill again.

Mr. THOMSON. I was not suggesting that. I would hope the industry works carefully and closely with your committee the way it has been invited to do so, and I am sure it will.

Senator INOUYE. And I am sure you are aware that this committee will be zeroing in on certain areas. One will be the must-carry rules. We will have hearings just on that.

The other is the exclusivity rules, and we will have hearings just on that. It will be a comprehensive process because we realize what is involved is the telecommunications industry itself.

So we take this assignment seriously, and I can assure you that whatever comes out will not be one that was resolved or reached haphazardly. It will represent many, many hours of work.

Mr. THOMSON. We appreciate that.

Senator INOUYE. And I would hope the staff is given some credit for work that it has done.

Mr. THOMSON. Nor did I intend any criticism of your very, very capable staff.

Senator INOUYE. Otherwise we would have had chaos and out of chaos we usually have chaotic bills.

Senator EXON. And we have had a lot of experience with that.

Senator INOUYE. I do not wish to be presiding over something like that.

Mr. Effros, you made a statement which concerns me. You somehow suggested that the rule-making process of the FCC did not provide an opportunity to you and others to make input, is that correct?

Mr. EFFROS. No, sir, not to make input. There was plenty of input on theoretical issues, but what the commission did is—and this is a commission that was led, of course, by a chairman who is no longer there, so we are not implying anything about the existing commission.

What that commission did was send a general notice of inquiry and rule making on the general issue and everybody filed in that, and then they went directly to adopting a rule.

The normal process would be a notice of inquiry on the general issue, then a rule-making proceeding where the commission would specify what it was thinking about in the specific written rules.

The problems that have happened and we are discussing here today really stemmed from how the rules actually work out in the real world. What the commission did is skip that step. They had the notice of inquiry and rule-making all in one where the commission did not state what its proposed rules would look like but only asked the general questions, and then it went directly to the rule making where it announced an adoption of a rule.

Senator INOUYE. When was that?

Mr. EFFROS. I do not have the specific dates, but that was after the proceeding. In other words, we only had a chance to say to the commission you must reconsider these within a 30-day period and change them. We never had a chance to have input on the design of the initial rules themselves, and that has created a lot of problems.

Senator INOUYE. Before the rules were identified and made public, were you given an opportunity to make an input again?

Mr. EFFROS. Only after they had been adopted. They were adopted first. Then we had to ask them to change them. We could not say hey, you have made a mistake in the way you wrote this in the first place. That is the way the normal Administrative Procedure Act requirements are, but they bypassed those.

Senator INOUYE. Did the FCC respond to your suggestions for change?

Mr. EFFROS. Well, no. We have lists of questions that the rules still do not respond to. And, as Mr. Johnson testified this morning, they have chosen not to even respond to them now. The industry is still up in the air on certain definitions and how the rules apply in certain cases, and the commission has simply said to us we are going to deal with this on a case-by-case basis. We are not going to relook at the rules to clean up those problems.

And it is creating massive problems particularly for operators who do not have lawyers, who spend all their time in Washington talking to the FCC on how these rules should be applied.

Senator INOUYE. Although I am chairman of this subcommittee, I finally got cable about a month ago, so I am still learning about cable, and last night I could not see anything because something happened to the line and everything went off, so I missed all the news last night. How much does it cost to blank out one hour, Mr. Thomson?

Mr. THOMSON. I can provide that figure for you for the record.

Senator INOUYE. Is there a cost involved in blanking out?

Mr. THOMSON. Just the initial capital cost in installing the equipment necessary to do that blanking out accurately. That is a cost, and if you would like I can provide you some figures and then try to allocate that capital cost and operating cost over the number of hours blanked out. Maybe I can provide you some sort of accurate figure.

Mr. Treeman. Mr. Chairman, may I add to that answer, please?

Senator Inouye. Sure.

Mr. Treeman. It might help to step through what a cable system operator has to do when he has a distant signal that requires blackout. The first thing he has to do is comb through all of his blackout notices to identify which of those notices are valid.

In a number of instances, he may not get proper documentation when he receives the notice, so he needs to go back to the broadcaster and say, "You did not give me everything that I need, can you give me some additional information?"

As things stand now, a cable operator is living in legal limbo. During the period after which he asks for additional information, the FCC has not been clear on whether he needs to black out the program or not.

Once he gets the additional information, he needs to evaluate all the blackout notices that he gets. Then he must go back to his distant signals and compare his valid blackout notices to the distant signal schedules. In some cases he may be notified a day before a program is scheduled to run, in other cases it may be several weeks, depending on when the distant signal schedule is available.

At that point, the operator is in a position to program a PC-driven switch or timer-operated switch to black out that program. So, it is an expensive, complicated operation, given that he has to watch the whole schedule from the distant signal and evaluate all his black-out notices before he can even make the most minor decision on one program.

Thank you.

Senator Inouye. I am just assuming that the broadcaster has about 19 hours. Let us say it is 19 hours. How many hours did TCI black out?

Mr. Thomson. When you are required to provide nondup protection for a network affiliate it covers between 85 and 90 percent of the programming day. That is about right, is it not, Bill and Travis, a close figure? On a network affiliate, a typical network affiliate, about 85 to 90 percent of their programming is in fact network programming, so in fact if there is a nondup request it is about 85 or 90 percent of the broadcast day, and that is why it really is not feasible to continue carriage of a nonduped distant signal, because we have to program that huge amount and pay twice plus carriage in order to program the same channel.

Senator Inouye. So for about 16 hours it is just blank, then?

Mr. Thomson. That is correct. That is exactly correct.

Mr. Duhamel. Senator, in Scottsbluff I have the figures. Senator Exon had referred to 204 hours. Our station has about 100 hours a week, and the other one has about 104, and it comes out to a little over 14 hours a day where we are carrying the programming, although I am not sure that is simultaneous or within an hour.

Senator Inouye. Can anyone give me an idea of the number of stations cable systems have dropped since the rule has gone into effect?

Mr. Treeman. Senator, I reported some information during my testimony on the number of systems that dropped the two services that United Video transmits that are not black-out free. The national figures are not ready yet. We will have those figures as soon as A. C. Nielsen has loaded one of their databases, and we expect that a reasonably accurate number will be available within about 30 to 45 days. I will be happy to provide that to you.[1]

Senator INOUYE. I would appreciate that.

Senator INOUYE. How many stations are now Syndex proof?

Mr. TREEMAN. Three super-stations.

Mr. THOMSON. National super-stations.

Mr. TREEMAN. WGN, WTBS and WWOR.

Mr. EFFROS. But Senator, that does not deal with the entire issue of network nonduplication. That is only syndicated exclusivity.

Senator INOUYE. How have the ratings been affected for programs where exclusivity has been involved.

Mr. TREEMAN. That is me again. It is too early to tell. Again, we are going to do a study. We feel like that is the bottom line on whether Syndex has done what it was intended to do, and those figures will be 30 to 45 days, and again I will provide those to you.

Senator INOUYE. Now, I hope that we will begin negotiations. But what is the added cost to broadcasters that they must pay for exclusivity?

Mr. DUHAMEL. Actually, it is lumped into the sum and every year the increase goes up, like when we deal with King World on things like Wheel of Fortune and Jeopardy we go up 10 to 15 percent a year, and we have just said that, you know, that this (Syndex) has got to be included, and it is included in that 10 to 15 percent increase.

Now, there are some like Tribune who do not provide it (Syndex), and our station has a policy—because this is part of the Syndex proof of exclusive rights—of not buying programs that do not have the Syndex exclusivity on them, because we consider it vital for our long-run survival. We have to have something to sell that is unique.

Senator INOUYE. Mr. Rockey?

Mr. ROCKEY. We follow the same procedure, Senator.

Mr. EFFROS. Senator, I think it should be pointed out that the cable industry paid—during the years that there was no syndicated exclusivity for broadcasters the cable industry paid for the fact that that syndicated exclusivity was missing.

The Copyright Royalty Tribunal charged cable operators, and that money went to the programmers. We are paying at the moment over $20 million a year. Ironically, we are still paying that fee even though the rules have been eliminated, because the Copyright Royalty Tribunal has not gotten around to eliminating its surcharge, but we are working on that.

Senator INOUYE. I realize that there are many elements in determining cost, but let us say that the cable operator is required to black-out a program. What does it cost him to replace that program with another one? Can you give us a few examples of certain types of programs?

Mr. THOMSON. I obviously cannot, because of contractual restrictions, cite any particular wholesale prices for our programming services. It is reasonable to expect that if you in fact want to replace programming the cost could run all the way from a few pennies up to a few dollars, depending on the quality and the nature of the programming that you are providing.

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[1] The material received is in the Committee files.

Certainly, if you are providing a regional sports channel as replacement programming, which in many cases will be in fact the type of programming that is used, that could be as much as $2 for replacement programming for a broadcast station.

Mr. DUHAMEL. That is per month?

Mr. THOMSON. I am sorry, $2 per subscriber, per month. It is no small amount.

Senator INOUYE. Just for one channel?

Mr. THOMSON. Yes, that is correct. A regional sports channel in some instances will cost $1.50, sometimes $2. That is why we have been so adamant about establishing a system where people have a chance to choose whether or not they want to actually subscribe to the regional sports channels and not be forced to take them as part of basic. That has been a bone of contention between regional sports programmers and cable operators. Our position is that subscribers should have a chance to choose.

Senator INOUYE. I suppose it does not make commercial sense to just have reruns all day long.

Mr. THOMSON. You could do that, but the problem is you would have people that felt very, very strongly about the presence of their distant signals. They have seen them for 30 years. In many cases these distant programming stations were there prior to the local broadcast station, so consequently, if you really want to throw oil on troubled waters you have got to consider offering substitute programming which has some quality, and programming costs a lot of money. You know that from the statistics you have heard at your Committee.

Mr. EFFROS. There are added complications, again, on the technical side. There are two issues on substitution. One is substitution of a single program. In other words, black-out one hour of a broadcast station's day and put in a given program, and the other question is, substitute an entire channel.

For the smaller operators it simply is not feasible to start substituting one program—a one-hour block here and a one-hour block there—partly because of the equipment, but partly because we know the equipment is not going to work perfectly all the time, and as soon as it does not the operator is going to have consumer complaints.

So it is not in the consumer's best interests, and it is certainly not in the operator's best interest, to set up a system that we know is far from fail-proof. The net result is that operators are more likely to eliminate the channel altogether. When you get these Swiss cheese schedules, the more likely result is you simply have to take the channel off altogether and then replace it with another channel.

You could replace it with a shopping channel, for instance, and it would not cost any money for the operator, but it would cost a great deal in terms of the satisfaction of local subscribers. So the more you try to satisfy your subscriber, the higher the cost, and that has to be reflected in fees, which make your subscribers unhappy again.

Senator INOUYE. Mr. Thomson, I realize you cannot speak for the cable industry, but am I correct to assume from your statement that if the Congress addressed the cable exclusivity rules to your satisfaction, all the problems here this morning would cease?

Mr. THOMSON. No.

Senator INOUYE. That is the impression I have.

Mr. THOMSON. I would not say that. We are not in any position to try to "blackmail" the Congress into passing legislation and we will make these problems go away. That is not going to happen. First of all, we have no power to make the problems go away. We can sort of alleviate the problems somewhat. Second of all, we simply would not presume to do that.

I will say that the atmosphere for negotiation between broadcasters and us would obviously improve if the broadcasters would stop attacking our right to bargain for exclusivity. Clearly it is a fact of human nature which we are not immune from.

Senator INOUYE. Well, I thank all of you very much. You have been very helpful.

[Whereupon, the hearing adjourned at 12:45 p.m.]

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